TECHNICAL GUIDE TO CENVAT CREDIT

The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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FOREWORD

Learning is a never ending process. The success and demand for a profession depends not only on its proactiveness in responding to the environment in which and for which it works but also on the readiness of its members to grasp and effectively use the changes in knowledge and technology that follow.

I am pleased to note that Indirect Taxes Committee has come out with "Technical Guide to CENVAT Credit". I am sure that members will find this Guide immensely useful as the CENVAT credit mechanism has been explained in a very exhaustive manner through illustrations, case studies and judicial pronouncements. This Guide will facilitate users in understanding the duty/tax credit mechanism which is key to the value added tax system being adopted in the country for indirect taxation and will be the base for Goods and Services Tax proposed to be introduced from 1.4.2011.

A comprehensive approach has been followed in defining inputs, input services and capital goods taking into consideration the departmental circulars and notifications issued in this regard along with judicial pronouncements. The entire procedure for availment and utilization of CENVAT credit and the specified duties and taxes which are eligible for CENVAT credit has been elucidated. The documents, records and returns required under CENVAT credit provisions are enumerated.

The Guide explains the concept of proportionate credit mechanism and the distribution and transfer of credit in plain words. The provisions pertaining to recovery of CENVAT credit taken or utilized wrongly and the penal provisions are also covered extensively.

My compliments to Indirect Taxes Committee in particular, CA. Bhavna Doshi, Chairperson, Indirect Taxes Committee for successfully completing the task and to CA. Bakul Mody for his valuable contribution in preparing the Guide.

I am sure that this "Technical Guide to CENVAT Credit" will be immensely useful for the members to enhance their knowledge for effectively discharging the responsibilities.

Date : August 10, 2010
Place : New Delhi

CA. Amarjit Chopra
President

PREFACE

Introduction of CENVAT credit across goods and services in the year 2004 was one of the major steps in indirect taxes reform process; the process which commenced in 1986 with introduction of MODVAT (Modified Value Added Tax) Scheme in the field of central excise duty (now renamed as CENVAT – Central Value Added Tax).

Initially, when service tax at Union level was introduced in 1994, it did not have input tax credit mechanism; as it was a new levy. However, the tax rate was kept low (5%) and it applied only to three categories of services. This limited the cascading effect. As number of services covered under the service tax net expanded, input tax credit mechanism was introduced from August 16, 2002 and, simultaneously, the rate of service tax was increased to 8%. The input tax credit scheme operated within service taxation only.

This resulted in two input tax credit schemes operating simultaneously and independent of each other in the field of indirect taxes at the Central Government level; one, under CENVAT in relation to central excise duty and another, under service tax. This meant that the manufacturers using services in the course of their business were not able to claim input tax credit in respect of service tax paid by them and that added to the cost of manufacture of goods. Similarly, service providers using CENVAT paid goods were not able to claim input tax credit in respect of the central excise duty paid on purchase of such goods and used in providing output taxable services. This led to cascading of taxes.

Expansion of scope of service tax and experience of implementation of service tax law for a reasonable period of time led to introduction of CENVAT credit across both these taxes – CENVAT and service tax. It is a unique mechanism as both these taxes (CENVAT and service tax) are levied by and administered under two separate legislations and yet input tax credit is allowed across these taxes.

The Scheme of CENVAT credit operates through CENVAT Credit Rules. These rules have undergone significant changes from time to time as the Government and the administrative authority (Central Board of Excise and Customs) have addressed issues and difficulties faced by tax payers and also taken steps to reduce cascading of taxes. The operation of CENVAT Credit Scheme including the predecessor MODVAT Credit Scheme has been subject matter of significant litigation both, in respect of substantive and

procedural aspects. CBEC has also been providing clarifications from time to time with a view to smoothen and simplify the process.

This Guide provides overview of the CENVAT Credit Scheme and also deals with the significant aspects of this Scheme. Users will find it helpful in dealing with CENVAT credit matters. It will also be of assistance in management audit of CENVAT credit. This Guide will also be of interest to those wishing to understand input tax credit mechanism in preparation for common Goods and Services Tax (GST) which is currently proposed to be introduced from 1st April, 2011.

I am grateful to CA. Bakul Mody who devoted significant time to prepare this very detailed Guide. I am also grateful to CA. Ashok Batra for providing material for some chapters and also providing invaluable suggestions in finalizing this Guide. I also acknowledge contribution made by CA. Ashok Chandak, Past President of ICAI, CA. Madhukar Hiregange, Vice-Chairman, Indirect Taxes Committee, CA. P. Rajendra Kumar, CA. Ravindra Holani, CA. Surendra Gupta, CA. M.P. Panneerselvan and CA. Rajiv Jaichand Luthia, members, Indirect Taxes Committee.

My special thanks to CA. Amarjit Chopra, President and CA. G. Ramaswamy, Vice-President, ICAI for their support and encouragement to the initiatives of the Indirect Taxes Committee. I also wish to place on record my appreciation for the sincere efforts put in by the officials of the Committee especially, CA. Smita Mishra, Secretary to the Committee, who painstakingly reviewed the Guide for updates.

I look forward to feed back for further improvements in this Guide.

CA. Bhavna Doshi
Chairperson
Indirect Taxes Committee

Date : August 10, 2010
Place : New Delhi

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CHAPTER I

Introduction and Transition

1.1 The concept

CENVAT (Central Value Added Tax) has its origin in the system of VAT (Value Added Tax) which is prevalent in over 100 countries in the world. The concept of VAT was developed to avoid the cascading effect of taxes. It was found to be a very good and transparent tax collection system, which reduces tax evasion, ensures better tax compliance and increases tax revenue.

MODVAT (Modified Value Added Tax) was introduced in India in 1986 (re-named as CENVAT w.e.f. 1.4.2000). The system was termed as MODVAT, as it was restricted up to the manufacturing stage and credit of only excise duty paid on manufacturing products (and corresponding CVD paid on imported goods) was available.

A system of State VAT (in lieu of sales tax) has been introduced in all the States in the Country.

1.2 Proposed integration of goods and services tax

A Task Force Committee was formed under chairmanship of Dr.Vijay Kelkar on Implementation of Fiscal Responsibility and Budget Management Act. The Kelkar Committee submitted its report in July, 2004. The Committee strongly recommended introduction of 'Goods and Services Tax' (GST).

Central Government, through the Union Budgets, has announced intention to introduce GST w.e.f. 1.4.2011.

As a major step towards the introduction of GST Regime, Union Finance Minister, Shri P. Chidambaram, in Para 148 of his Budget Speech on 8.7.2004, stated as follows.

"I propose to take a major step towards integrating the tax on goods and services. Accordingly, I propose to extend credit of service tax and excise duty across goods and services."

To give effect to the above proposal, the revised CENVAT Credit Rules, 2004, have been issued and made effective from 10.9.2004.

1.3 CENVAT Credit Scheme

(a) Section 37 of Central Excise Act, 1944 (the Act), empowers the Central Government to make rules *inter alia* to:

(i) provide for the credit of duty paid or deemed to have been paid on goods used in or in relation to the manufacture of excisable goods;

(ii) provide for giving of credit of sums of money with respect to the raw materials used in the manufacture of excisable goods;

(iii) provide for credit of service tax leviable under the Finance Act, 1994 (hereinafter referred to as Act) paid or payable on taxable services used in or in relation to the manufacture of excisable goods.

In exercise of these powers, MODVAT Credit Scheme was introduced in 1986 vide Rules 57A to 57U. Since rules can be amended easily by Central Government, the Scheme remained flexible and hence could be modified quickly as per changing requirements. CENVAT was introduced in place of MODVAT w.e.f. 1.4.2000, vide a new set of Rules 57AA to 57AK. Later, separate CENVAT Credit Rules, 2001, were introduced w.e.f. 1.7.2001. These were replaced by CENVAT Credit Rules 2002, which in turn were superseded by CENVAT Credit Rules, 2004 w.e.f. 10.9.2004.

(b) Section 94 of the Act empowers the Central Government to make rules for providing credit of service tax paid on services consumed or duties paid or deemed to have been paid on goods used for providing taxable services.

Service Tax Credit Rules, 2002 were issued effective from 16.8.2002. Under the said Rules, initially credit availment was permitted vis-à-vis same services category. Thereafter, the said Rules were amended to permit availment of credit across services.

(c) With effect from 10.9.2004, Government has notified CENVAT Credit Rules, 2004, in supersession of the following :

(i) CENVAT Credit Rules, 2002; and

(ii) Service Tax Credit Rules, 2002

CENVAT Credit Scheme introduced w.e.f. 10.9.2004, is an exceptional and unique, inasmuch as it is a credit mechanism which covers two different laws governing central excise duty and service tax.

(d) To put the CENVAT credit scheme in a simple perspective, CENVAT Credit Rules, 2004 permit availment of CENVAT credit across goods and services, broadly in the following manner :

- Manufacturer can avail CENVAT credit of service tax paid on input services which can be set off against excise duty payable on final products manufactured i.e., excisable products.
- Service provider can avail CENVAT credit of duties paid on inputs/capital goods which can be set off against service tax payable on output services i.e., taxable services.

1.4 Validity of earlier Circulars and Notifications

Rule 16 of CENVAT Credit Rules, 2004 states that earlier notifications, circulars and trade notices issued under CENVAT Credit Rules, 2002 and Service tax Credit Rules, 2002 will continue to be valid, to the extent they are relevant and are consistent with new Rules. It would appear that, generally circulars can be validated, but notifications issued under Rules/Act would lapse when the main Rules/ Act, are withdrawn. In Air India vs.UOI (1995) 4 SCC 734, it was held that when the main Act lapses, the subordinate legislation also lapses, unless there is an express saving clause in the repealing statute. Since there is a saving clause under CENVAT Credit Rules, 2004, it would reasonably appear that, notifications may also be valid to the extent relevant and consistent.

1.5 Transitional provisions

It has been specifically provided in Rule 11(1) of CENVAT Credit Rules, 2004 that any amount of credit earned by a :

- Manufacturer under CENVAT Credit Rules, 2002 or
- Service provider under Service Tax Credit Rules, 2002

as they existed prior to 10.9.04 and remained unutilized on that day shall be allowed as CENVAT credit to such manufacturer of final products/service provider under CENVAT Credit Rules, 2004 and shall be allowed to be utilized in accordance with the provisions of CENVAT Credit Rules, 2004.

For example, take a case of service provider who has availed input services prior to 10.9.04 on which service tax has been charged and the payment for the same is made by the service provider in September 2004. He should be entitled to CENVAT credit of the service tax paid on input service as service providers were entitled to the benefit of credits on input services even before 10.09.04. However, the position would change, if the input service had been availed by a manufacturer prior to 10.09.04 instead of a service provider. In such a situation, the credit on such input service would not be available to such manufacturer as manufacturers were not entitled to avail credits of service tax on input service under the earlier set of Rules in force prior to 10.09.2004.

CHAPTER II

Beneficiaries

2.1 Beneficiaries

Under CENVAT Credit Rules, 2004, there are only two types of beneficiaries who can avail the benefit of CENVAT credit viz.:

(a) manufacturer of final products

(b) output service provider

Hence, in order to avail the benefit under CENVAT Credit Rules, 2004, it is absolutely essential that such person is either a manufacturer of final products or output service provider or both. It should be noted that an assessee would not be entitled to CENVAT credits just because he happens to be a manufacturer or a service provider; importance should also be given to the excisability of the goods manufactured and the taxability of the services provided by him.

2.2 Trading activities

It is commonly found that a person is often engaged in trading activity (buying and selling of goods/services). The same could be in one or more of the following combinations:

(a) Only Trading

(b) Manufacturing and Trading

(c) Services and Trading

(d) Manufacturing, Services and Trading

As regards pure trading activity, it is very clear that the benefit of CENVAT credit (viz. service tax paid on input services and excise duty paid on inputs/capital goods) would not be available to such dealer.

Under central excise, there is a registered dealer mechanism whereby it is possible for a trader in excisable goods to pass on excise duty/CVD to the customer by issue of an excise invoice. However, the dealer mechanism would involve compliances like registration with Excise department, issue of excisable invoices, maintenance of

records and filing of returns. The said mechanism is permitted only up to the second stage dealer.

In the case of Metro Shoes Pvt. Ltd. vs. CCE (2008) 10 STR 382 (Tri – Mumbai), it has been observed as under :

"……..Credit availed on the services which are directly/wholly attributable to the trading activity is ineligible to be availed as input service credit."

In regard to persons engaged in trading activities along with manufacturing/services/ or both, it would reasonably appear that, on a harmonious construction of CENVAT Credit Scheme in totality, the Principle of Proportionate Credit (discussed in Chapter XI) may be relevant in regard to Common Input Services.

However, it may be noted that a view was expressed in the decision of Commissioner (Appeals) in Faber Heat craft Industries Ltd. case 2008 (12) STR 252 Comm. (Appeals) wherein it was held that trading cannot be equated with exempted goods or services for the purpose of denying CENVAT credits on common input services, where the manufacturer or service provider happens to be engaged in trading activity as well.

Further, in the case of Orion Appliances Ltd. v CST (2010) 19 STR 205 (Tri.-Ahmbd) where the assessee, providing taxable services and engaged in trading activity, availed CENVAT credit on input services used for taxable services as well as trading activity, the Tribunal has held as under:

(i) Trading activities is nothing but purchase and sales and cannot be called a service and therefore it cannot be considered as exempted service.

(ii) Rules 6(2) and 6(3) of the CENVAT Credit Rules, 2004 only deal with a situation where service provider is providing taxable and exempted services. Therefore, since trading activity is not an exempted service rule 6 cannot be applied to such a situation.

(iii) The only obvious solution which would be legally correct appears to be to ensure that once in a quarter or once in six months the quantum of input service tax credit attributed to trading activity according to standard accounting principles is deducted and the balance only availed for the purpose of payment of service tax of output service. This is not against the law in view of the fact there are several decisions of various High Courts and also the

Tribunal wherein a view has been taken that subsequent reversal of credit amounts to non-availment of credit.

The issue of CENVAT credit entitlement on common input services, where trading activity is carried out alongwith with manufacturing/or services, is contentious. The same needs to be addressed to avoid litigations.

2.3 Service Tax Refund Mechanism for Exporters

In regard to merchant exporters of goods, a refund mechanism has been notified vide Notification No. 41/07 – ST dated 6.10.2007 and other subsequent Notifications, whereby in regard to specified services a refund can be claimed for service tax paid subject to the compliance of prescribed procedure and conditions.

The above stated refund mechanism has been superseded by a modified refund scheme and an Exemption Scheme vide Notification No. 17/2009 – ST dated 7.7.09 and Notification No. 18/2009 – ST dated 7.7.09.

For details of the Scheme reference can be made to relevant Notifications & Departmental Clarifications issued vide TRU Letter F No. 334/13/2009 / TRU dated 6.7.09.

CHAPTER III

Inputs

3.1 Eligible inputs

3.1.1 Inputs for a manufacturer of final products – Definition of 'input' under Rule 2(k) of CENVAT Credit Rules, 2004, as far as manufacturer of final products is concerned, is as follows –

"input" means all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to the manufacture of final products or for any other purpose, within the factory of production.

The following emerges from the pattern of the definition: -

The definition can be seen in two parts –

- The first part being specific which allows credit on all goods except those that are excluded.
- The second part which deals with the goods which would be regarded as inputs. This portion clarifies the scope of the said definition of "inputs" as there can be doubts in certain cases as to the qualification of certain goods as inputs. The goods covered in this portion can also be regarded as "inputs".

The scope of 'Inputs' eligible to credit by a manufacturer of final products, has been a subject matter of extensive judicial consideration, under MODVAT/CENVAT. The principle that emerges from judicial rulings is that the scope of inputs eligible to MODVAT/CENVAT credit is very wide. The same is very much relevant for CENVAT Credit Rules, 2004 as well.

In this regard the following important judicial rulings, in particular, need to be noted:

- According to the dictionary, the word 'input' means 'what is put in', 'enter', 'enter system'. Analysing the use of this word in the context of the Bihar Finance Act, the Supreme Court cited this dictionary meaning and observed that the 'use of the word was indicative that the benefit was intended in respect of every item which was raw material in the widest sense'

  [Tata Engineering and Locomotive Co. Ltd. vs. State of Bihar (1994) 74 ELT 193 (SC)].

- The High Court observed that, while the expression 'in manufacture of' denotes direct participation of the inputs in the manufacturing process resulting in the emergence of the final product, the words 'in relation to manufacture' convey the meaning of the indirect participation of the inputs in the manufacture of final product, subject to the condition that the indirect participation is essential to the manufacture of the final product.

  [Tata Engineering and Locomotive Co. Ltd. vs. UOI (1994) 72 ELT 525 (PAT)].

- In a fairly elaborate discussion and by taking into account the previously decided cases on the issue about the true scope of the expression 'in relation to manufacture', a Larger Bench of the Tribunal observed as follows:

  "…..The wide impact of the expression "used in relation to the manufacture" must be allowed its natural play. Raw materials (as commonly understood) are used in the mainstream of entire process of converting raw materials into finished products or any other process integrally connected with the ultimate production of finished products. The purpose is certainly to widen the scope, ambit and content of "inputs" so as to attract the goods which do not enter directly or indirectly into the finished product but are used in any activity concerned

with or pertaining to the manufacture of finished goods….."

Union Carbide India Ltd. v. CCE (1996) 86 ELT 613 (New Delhi – CEGAT, LB).

- Land mark judgement of Supreme Court in Maruti Suzuki Ltd. v CCE (2009) 240 ELT 641 (SC) - In this case the assesee, a manufacturer of vehicles, availed credit of duty paid on goods (fuel) used in the generation of electricity used captively. Some part of the electricity was also wheeled out to its joint ventures and vendors. The department sought to reverse the proportionate CENVAT credit to the extent of power wheeled out to joint ventures, vendors, etc. which the appellant resisted.

  On appeal, the Supreme Court held :

  (a) The definition of "inputs" can be divided into three parts :

    (i) specific part: 'all goods, except light diesel oil, high speed diesel oil and petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not'.

    (ii) Inclusive part: 'lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose'

    (iii) Place of use: 'within the factory of production'

  (b) The intention of the Legislature is that inputs falling in the inclusive part must have nexus with the manufacture of the final product. In each

case it has to be established that inputs mentioned in the inclusive part is "used in or in relation to the manufacture of final product". It is the functional utility of an item which would constitute the relevant consideration. Unless and until the said input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible input.

(c) The definition is in three parts, namely, specific part, inclusive part and place of use. All the three parts are required to be satisfied before an input become an eligible input.

(d) Under the CENVAT Credit Rules, 2004, the inclusive part of the definition states the crucial requirement of the specific part viz.,

"used in or in relation to manufacture of final products".

(e) Electricity generation does not form part of manufacturing process though it may be connected with, or ancillary to, or anterior to, manufacture. It is on account of the use of the expression "used in relation to manufacture" that such an activity of electricity generation comes within the ambit of the definition because it is integrally connected with the manufacture of the final product. <u>However, the definition of "input" would cover inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose. They are not entitled to CENVAT credit to the extent of the excess electricity is cleared at the contractual rates in favour of joint ventures, vendors etc., which is sold at a price.</u>

3.12 <u>Inputs for service provider</u> - As per Rule 2(k)(ii) of CENVAT Credit Rules, 2004:

"input" means all goods except light diesel oil, high speed diesel oil, motor spirit (commonly known as petrol) and motor vehicles used for providing any output service.

The following needs to be noted: -

- there is very clear and distinct difference in terminology employed in definition of "input" for service provider as compared to that for manufacturer of final products. However, it would appear that the scope of 'Inputs' eligible to credit is wide.
- In the 'inputs' definition for service provider, there is an exclusion of motor vehicles in addition to low speed diesel oil, high speed diesel oil and motor spirit. However, it is pertinent to note that, capital goods generally have not been excluded from the definition of inputs. Thus, where any item does not qualify as capital goods for claiming credit, the same can be examined under the definition of inputs as there is a possibility of the concerned goods being eligible for credits as inputs.

3.2 User requirements

(a) The following important aspects in regard to the user requirements to be complied by a manufacturer/producer of final products need to be noted:

- the use of inputs should be in a 'factory' .
- the said factory should be the same factory in which the final products are manufactured from such inputs.

(b) The following broad propositions emerge as to user requirement:

- Repetitiveness of use or one time use is not relevant.
- Frequency of use/rapidity of consumption is not relevant.
- Complete consumption of inputs is not necessary.
- One to one co-relation is not required.

(c) Service provider is eligible for CENVAT credit on inputs, if these are used for providing output service. The definition does not say 'exclusively used'. It also does not specify the period for which the inputs should be used.

3.3 Inputs not eligible to credit

If a manufacturer of final products manufactures more than one product, it may happen that some of the products are exempt from duty. In such cases, credit of duty paid on the inputs used for the manufacture of exempted products cannot be availed.

In CCE vs. Modi Rubber (2001) AIR SCW 4363 (SC 3 member bench), it has been held that no credit of duty paid on inputs is available if the final product is exempt from duty. The said decision is in respect of Proforma Credit Scheme (prevalent before the introduction of MODVAT). However, the principles laid down thereunder are relevant for CENVAT Credit Rules, 2004 as well. This would be so even if intermediate products which are dutiable are manufactured but not cleared. But where intermediate products are cleared on the payment of duty of excise, CENVAT credit on inputs used for manufacturing of such intermediate products cleared on payment of duty, could be availed.

3.4 Point of time for determination of eligibility/relevance of classification

Refer Paras 8.1 and 8.5 in Chapter VIII – Availment of Credit.

3.5 Capital goods manufactured in the factory of a manufacturer of final products

Explanation 2 to Rule 2(k) which defines "input" provided that, input includes goods used in the manufacture of capital goods which are further used in the factory of the manufacturer. An amendment has been made w.e.f. 7.7.09 in the said explanation to specifically provide that, input shall not include cement, angles, channels, centrally twisted deform bar (CTD) or thermo mechanically treated bar (TMT) and other items used for construction of factory shed, building or laying foundation or making of structures for support of capital goods.

Refer Larger Bench Ruling – Para 3.6(d) hereafter.

3.6 CENVAT credit on construction materials

(a) Input – Cement used as building material for laying foundation cannot be directly or indirectly said to be an integral part in connection with manufacture of final product, hence not an input entitled for credit in terms of Explanation II to Rule 2(g) of CCR, 2002 – Since foundation made of cement does not fall

under category of capital goods as per Rule 2(b) ibid, and since cement was used in the construction of foundation, it cannot be said to be eligible capital goods also for purpose of availing CENVAT credit – Rules 2(a) and 2(k) of CENVAT Credit Rules, 2004.

[UOI v. Hindustan Zinc Limited (2007) 218 ELT 503 (Raj.)]

(b) Inputs – Construction materials – Cement used for construction, repair or maintenance of mines not eligible input to avail CENVAT credit as it was not integrally connected/co-extensive with process of manufacture – Rule 2(g) of CCR, 2002 – Rule 2(k) of CENVAT Credit Rules, 2004.

[UOI v. Hindustan Zinc Ltd. (2008) 225 ELT 183 (Raj.)]

(c) Credit of excise duty paid on cement and steel used for construction of jetty and storage tanks availed by provider of Port service – Statutory definition of input restricted when used for providing output service – Cement and steel used for output service of construction of building and not used for providing port service – Cement and steel not inputs for Port service and credit thereon not admissible – Rules 2(k), 13 and 14 of CENVAT Credit Rules, 2004.

[Mundra Port & Special Economic Zone Ltd. v. CCE (2009) 13 STR 178 (Tri. – Ahmd)]

(d) Cement and steel – Inputs – Cement and angles, joists, bars and beams used for fabrication of structures/ installation of production machinery whether inputs for credit admissibility – Definition of input amended from 7.7.2009 – Explanatory Memorandum presented to the Parliament, amending notification and Departmental clarification showing that cement and steel items used for construction of shed, building or structure for support of capital goods never intended to be included under "inputs' – Cement and steel items used for foundation and for building supporting structure for capital goods not having nexus with manufacture – Foundation and structures not being capital goods or parts or accessories of capital goods, cement and steel items are neither inputs nor capital goods therefor, Cement and steel items used for laying foundations and for building structural support not covered under inputs

even for period before amendment from 7.7.2009 – Credit not admissible.

Capital goods whether include plant and structures embedded to earth – Factory shed, building, foundation and structures not specifically listed under definition of capital goods while moulds, dies and tanks specifically included – Foundations and supporting structures embedded to earth can be categorized as capital assets but not qualify as capital goods as per definition in CENVAT Credit Rules, 2004 – Foundation and supporting structures are neither machinery items, nor components, spares and accessories of machineries, nor listed for inclusion in definition of capital goods – Capigal goods have to be goods first and foundation and supporting structures being immovable properties are not goods or excise goods – Question whether particular plant or structures embedded to earth to be considered as excisable goods, to be determined based on Supreme Court decisions.

CENVAT Credit Rules, 2004, amendment thereto whether retrospective – Definition of input amended from 7.7.2009 to exclude cement, angles, channels and other items used for construction of factory shed or building or for structures for support of capital goods – Explanatory Memorandum to Finance (No.2) Bill, 2009 stating that purpose of amendment clarificatory and the same reiterated by Budget Bulletin and other Departmental clarifications – Intention behind amendment to merely clrify coverage under "input" and no indication that amendment made to change scope of CENVAT Credit Rules, 2004 or to introduce new provision.

Credit not admissible based on value addition when items not used in manufacture – Cement and steel items used for laying foundation and building structural support contended as contibuting to value of final products and credit admissible – Excise duty not in the nature of value added tax – Credit not allowed as per statute with reference to value addition – Supreme Court in Maruti Suzuki case [(2009) 240 ELT 641 (SC)] referred to integral connection with final product, dependence test and functionality test to decide an item as input eligible for CENVAT credit – Impugned items not being

used in course of manufacture of final product, credit thereon not admissible.

Capital goods vis-a-vis capital assets – Capital assets and capital goods not synonymous as per Central Excise Act, 1944 and CENVAT Credit Rules, 2004 – Capital goods defined in CENVAT Credit Rules, 2004 enumerating number of goods - Phrase 'capital assets' having wider meaning and includes capital goods and other assets like immovable property like building – Foundations and supporting structures embedded to earth can be categorized as capital assets but not qualify as capital goods as per defintion in CENVAT Credit Rules, 2004.

Inputs vis-a-vis capital goods – Inputs not include machinery since inputs and capital goods dealt with separately in CENVAT Credit Rules, 2004 – Definition of input cannot be interpreted to include either capital goods or foundation and supporting structure for such capital goods.

Credit admissibility, powers therefor – Credit of input tax paid on all goods and services purchased by an assessee not authorized by the Parliament as all outputs may not be taxable – Power to grant credit of excise duty paid on goods is limited under excise law - Section 37 of Central Excise Act, 1944.

[Vandana Global Ltd. v. CCE (2010) 253 ELT 440 (Tri – LB)]

3.7 Some judicial rulings

(a) Low Sulphur Heavy Stock (LSHS) and furnace oil used to generate electricity which is captively consumed for the manufacture of final product such as caustic soda, cement etc. – Without continuous supply of such electricity generated in the plant, the manufacture of cement/caustic soda is not possible – Assessee entitled to MODVAT credit on LSHS in view of expression "used in relation to the manufacture" in Rule 57A of Central Excise Rules, 1944 even before 16.3.1995 – [Rules 2(k) and 3 of CENVAT Credit Rules, 2004]. Inputs used as a fuel for generation of electricity captively consumed will qualify for MODVAT Credit only if they are used "in or in relation to manufacture of final product" such as cement, caustic soda etc.

Inputs used in generation of electricity which is consumed by residential colony of factory's worker's families, schools etc. –

Credit held as not admissible.

[CCE v. Solaris Chemtech Ltd. (2007) 214 ELT 481 (S.C.).

(b) Captive power plant located outside factory premises, requirement of separate registration – Assessee allowed CENVAT/MODVAT credit on inputs used in such plant and same attained finality – Order for inclusion of plant within ground plan / blue print of registered premises not required – Departmental appeal rejected – Rule 9 of Central Excise Rules, 2002.

[CCE v. Nalco Ltd. (2007) 216 ELT 458 (Tri – Kolkata)]

(c) Inputs and capital goods situated in one unit and captive power plant in another unit, but both in the same factory premises – Electricity manufactured from said inputs and capital goods used both for captive consumption and sale – Since captive power plant, a new industrial undertaking situated within same premises of existing unit of appellants, credit on inputs and capital goods placed in the other unit is admissible – Rule 2(a), 2(k) and 3 of CENVAT Credit Rules, 2004.

[Reliance Industries Ltd. v. CCE (2007) 215 ELT 413 (Tri – Mumbai)].

(d) Inputs not put to use in manufacture but cleared as such after repacking on the payment of central excise duty – Credit taken thus returned by paying duty at the time of the clearance of items – Assessee could use items as a trader and MODVAT provisions allow such treatment – Once equal credit or more amounts returned at the time of removal of impugned parts, requirement of reversing credit at the time of clearance of inputs as such remains satisfied – Demand and penalties set aside – Rule 57-I of Central Excise Rules, 1944, Rule 3(5) of CENVAT Credit Rules, 2004.

[Sona Koyo Steering Systems Ltd. v. CCE (2007) 208 ELT 211 (Tri – Del)].

(e) Inputs short received – Quantity of LDO received less by 2% due to evaporation loss in transit – proportionate reversal of credit sought – since transportation of raw materials is a process in or in relation to manufacture, entire credit of duty on inputs lost in transit admissible – Impugned order set aside - Rule 3 of CENVAT Credit Rules, 2004; Rajasthan State

Chemicals Works (1991) 55 ELT 444 (SC) followed.

[Ganges Valley Foods (P) Ltd. v. CCE (2007) 217 ELT 147 (Tri – Kolkata)].

(f) Short receipt of inputs due to weighbridge differences – Where shortages observed are not significant (within 1% to 2% range) and supplier is not debited for the proportionate price, these quantities not to be considered as short receipt of inputs – Rule 57-I of erstwhile Central Excise Rules, 1944 – Rule 14 of CENVAT Credit Rules, 2004.

[Estee Auto Pressings Pvt. Ltd. v. CCE (2007) 209 ELT 211 (Tri – Chennai)].

(g) Credit held as not admissible on the inputs used in repairs and maintenance of capital goods - Larger Bench Ruling in Jaypee Rewa Cement v. CCE (2003) 159 ELT 553 (Tri – LB) followed.

[JK Cement Works v. CCE (2007) 211 ELT 235 (Tri – Del)].

(h) CENVAT credit not to be denied on procedural irregularities - Common inputs used in exempted final product as well as in dutiable intermediate product - Credit not taken initially, final product being exempted from the payment of duty - However appellant having cleared intermediate product on the payment of duty due to business exigencies, eligible for CENVAT credit- Moreover, proper procedure followed by appellant by payment of 10% of value of exempted goods - Non maintenance of separate accounts by appellant is merely technical lapse especially, when appellant is having no plans to clear the intermediate product on payment of duty.

[Aurobindo Pharma Ltd Vs CCE Hyderabad (2008) (223) ELT 196 (Tri-Bang)].

(i) CENVAT/MODVAT - Input - Welding electrodes used for the maintenance and repair of machineries in the cement plant - Item having been used in relation to the manufacture of final product, hence, eligible for credit.

[Vasavadatta Cements Vs CCE Belgaum (2008 (230) ELT 335 (Tri-Bang)].

(j) Shortage of inputs – CENVAT credit whether deniable on difference between weight of inputs recorded on receipt in

premises and weight recorded in relevant invoice – Tribunal decisions holding negligible difference due to transit loss to be ignored and full credit to be allowed – Differences held as ignorable as per tolerance limits, in few decisions – Different types of shortages cannot be dealt with by one inflexible or fixed standard for allowing credit – Decision on credit admissibility dependent on various factors to see whether entire consignment received in factory without diversion – Tolerance for hygroscopic, volatile and such other cargo to be allowed as per industry norms excluding unreasonable or exorbitant claims – Minor variations due to weighment by different machines to be ignored if within tolerance limits – No hard and fast rule can be laid down for dealing with different kinds of shortages – Rule 3 of CENVAT Credit Rules, 2004.

[CCE vs Bhuwalka Steel Industries Ltd. (2010) 249 ELT 218 (Tri. –LB)].

CHAPTER IV

Capital Goods

4.1 Eligible capital goods

(a) Rule 2(a) (A) of CENVAT Credit Rules, 2004 specifically defines and states that capital goods means the following :

(i) All goods falling under following Chapters/Headings of First Schedule to Central Excise Tariff Act, 1985 :

- 82 – Tools, Knives and related goods
- 84 – Machinery and related goods
- 85 – Electrical and related goods
- 90- Measuring, Testing, Checking and related goods
- Heading 68.05
- Grinding wheels and the like and parts thereof falling under Heading 68.04.

(ii) Pollution Control Equipment

(iii) Components, Spares and Accessories of the goods specified above

(iv) Moulds and Dies

(v) Refractories and Refractory Material

(vi) Tubes, Pipes and Fittings thereof, used in the factory

(vii) Storage Tank

(b) Motor vehicles are not eligible capital goods for a manufacturer of final products. However, in the context of specified service providers mentioned in the table below, motor vehicles registered in the name of such service provider for providing taxable service would constitute eligible capital goods.

Service Category	Section of the Act
Courier	65(105)(f)
Tour Operator	65(105)(n)
Rent-a-Cab Scheme Operator	65(105)(o)
Cargo Handling Agency	65(105)(zr)
Goods Transport Agency	65(105)(zzp)
Outdoor Caterer	65(105)(zzt)
Pandal or Shamiana Contractor	65(105)(zzw)

(c) With effect from 22.06.2010, dumpers or tippers used for providing the following services would constitute eligible capital goods :

(i) site preparation and clearance, excavation, earth moving and demolition services;

(ii) mining services

provided that such dumpers or tippers are registered in the name of such output service provider.

4.2 Ineligible capital goods

(a) Capital goods used exclusively for the manufacture of exempted goods or providing exempted services are not eligible for credit.

(b) Rule 2(a)(A)(1) of CENVAT Credit Rules, 2004 states that the equipment or appliances used in an office will not be eligible capital goods. However, this restriction is only for manufacturer of final products and not for service provider. The term 'office' is not defined. Hence, the word would have to be understood in terms of trade/commercial parlance.

4.3 User requirements

(a) The user requirements to be satisfied by a manufacturer of final products are as under:

- the use of capital goods should be in a 'factory'.
- the said factory must be the same factory in which the final products are manufactured.

(b) The following judicial rulings need to be noted :

(i) In the case of Vikram Cement v. CCE (2006) 197 ELT 145, the Supreme Court held as under:

- if the mines were captive mines so that they constituted one integrated unit together with the concerned cement factory, CENVAT credit on capital goods used in such mines would be available to the assessee, and
- if the mines were not captive mines in the sense that they were situated outside the factory premises but they supplied limestone to various cement companies of different assesses, capital goods used in such mines would not be eligible for credit.

(ii) In the cases of Birla Corporation Ltd. v. CCE (2005) 186 ELT 266 (SC) and CCE v. Manikgarh Cement Ltd. (2005) 190 ELT 7 (SC), the Supreme Court has held that the duty paid on spares to ropeways connecting mines with the factory for the transportation of crushed limestone was entitled to credit.

(c) The following broad propositions emerge as to the satisfaction of the user requirement :

- Principles of potential use / ready to use / passive use would be relevant
- Use need not be exclusive
- Use need not be repetitive and continuous

(d) Rule 3(1) of CENVAT Credit Rules, 2004 provides that CENVAT credit of capital goods can be taken of duty paid on capital goods received in the factory of manufacturer of final products or premises of service provider. The Rule does not require its installation or commissioning before 'taking' credit. However, possession is required in the subsequent year/s.

(e) Service provider is eligible for CENVAT credit on capital goods, if these are used for providing output service. Unlike in the

case of manufacturer of final products, it is not provided that, service provider should use capital goods in their premises. The definition does not say 'exclusively used'. It also does not specify the period for which the capital goods should be used. Propositions stated in (c) above would be relevant.

4.4 Point of time for determination of eligibility/relevance of classification

Refer Paras 8.1 and 8.5 in Chapter VIII – Availment of Credit.

4.5 Ownership is not relevant

The definition of capital goods does not make any mention about the ownership factor. The requirement of direct purchase and transfer of property in the name of the CENVAT beneficiary are not pre-requisite conditions. Reference could be made to rulings in German Remedies Ltd. V. CCE (2002) 144 ELT 606 (Mumbai – CEGAT) and Maruti Udyog Ltd. v. CCE (2004) 165 ELT 226 (New Delhi – CESTAT).

4.6 Parts, components etc. need not fall under Chapters 82, 84, 85 or 90

It has been clarified vide CBEC Circular No. 276/110/96 – TRU dated 12.1996 that components, spares and accessories need not fall in Chapter 82, 84, 85 or 90. They can fall in any chapter. The only condition is that they should be a part, component or accessory of machinery specified in clause (i) of rule 2(a)(A) of CENVAT Credit Rules, 2004. In this regard reference can also be made to ruling in CCE vs. Hindustan Motors Ltd. (2007) 217 ELT 378 (Tri – Kolkatta).

4.7 Capital goods on hire purchase/lease/loan

Rule 4(3) of CENVAT Credit Rules, 2004 provides that capital goods obtained on hire purchase, lease or loan agreement from a financing company are eligible for CENVAT. [Though no procedure has been prescribed, it would be advisable to ensure that the invoice issued by the manufacturer of capital goods shows name of the manufacturer of final products/service provider as consignee though the invoice of the manufacturer of capital goods would be in name of the financing company].

4.8 Goods imported under Project Imports

Goods (mainly machinery) imported under 'project imports' is classified under Chapter 98.01 of Customs Tariff Act, 1985 for customs purposes. Actually, the machinery / goods may be classifiable under different chapter heading as per Customs Tariff Act, 1985. There is no corresponding chapter 98 in Central Excise Tariff Act, 1985. It has been clarified that even if imported goods are classifiable under Chapter 98 for customs purposes, it would be eligible for CENVAT credit.

If separate invoice of CIF value of eligible capital goods is not available, certificate of independent cost accountant should be obtained in prescribed form. Refer MF (DR) Circular No 351/67/97-CX dated 5.11.1997.

4.9 Capital goods manufactured within the factory

As per Explanation 2 to Rule 2(k) of CENVAT Credit Rules, 2004, 'input' includes goods used in manufacture of capital goods which are further used in the factory of manufacturer but shall not include cement, angles channels, centrally twisted deform bar (CTD) or thermo mechanically treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods. Thus, if a manufacturer of final products manufactures some capital goods within the factory, goods used to manufacture such capital goods will be eligible as 'inputs'. [i.e. 100% CENVAT credit will be available in the same financial year]. It may be noted that capital goods manufactured within the factory and used within the factory are exempt from excise duty vide Notification. No. 67 / 95 – CE dated 16.3.1995.

4.10 Capital goods sent for job work etc.

(a) With effect from 1.4.2008, it has been specifically provided that, capital goods can be removed outside the premises of service provider for providing output service without any reversal of credit.

(b) Rule 4(5)(a) of CENVAT Credit Rules, 2004 specifically provides that capital goods can be sent to a job worker, as such or after being partially processed, for processing, testing, repair, reconditioning or for any other purpose. The said capital goods should be brought back in 180 days.

(c) Rule 4(5)(b) of CENVAT Credit Rules, 2004 provides that moulds, dies, jigs and fixtures, can be sent to a job worker for the production of goods on behalf of and according to specifications of the manufacturer of final products sending the moulds, dies, jigs and fixtures.

The requirement that capital goods should be brought back within 180 days is not applicable in the case of moulds, dies etc. so sent under rule 4(5)(b).

An amendment has been made w.e.f. 27.2.10 to allow CENVAT credit, even in cases where jigs, fixtures, moulds and dies are sent by a manufacturer to another manufacturer for the production of goods according to their specifications.

4.11 Restriction on depreciation

Refer Para 7.1(e) in Chapter VII – Restrictions on Credit Availment

4.12 Departmental clarifications

(a) CENVAT credit of excise duty/CVD paid on goods used in providing supply of tangible goods service [Board's letter F. No. 137/120/2008 –CX.4 dated 23.10.2008]

Supply of tangible goods including machinery, equipments and appliance for use, without transferring right of possession and effective control of such tangible goods is a taxable service in terms of provision of Section 65(105) (zzzzj) of the Finance Act, 1994. In some cases vehicles, aircrafts, vessels etc., are also supplied in the above manner and such activities also fall under the said taxable service. In this regard, a doubt has arisen whether the credit of excise duty / additional duty of customs (commonly known as CVD) paid on such items are available to the provider of such taxable service and if so whether such goods should be considered as 'inputs' or capital goods', for the purposes of the CENVAT Credit Rules, 2004.

The matter has been examined. It is possible that some of such goods may either fall within the definition of 'capital goods' or may not be covered under the said definition. However, as these goods are primary requirements for providing the above mentioned 'output services' for such

service providers, the goods including vehicles, aircrafts, vessels etc., are in the nature of 'inputs'. It is emphasized here that this clarification is valid only when the output service is in the nature of service defined under the provisions of Section 65(105) (zzzzj) of Finance Act, 1994 and the goods in question are the tangible goods supplied during the course of providing the taxable service.

(b) CENVAT credit of service tax for ceramic tiles industry - [C.B.E & C. Circular No. 899/19/2009 –CX., dated 25.9.2009]

Attention is invited to Notification No. 5/2006-C.E., dated 1.3.2006 which stipulates that central excise duty at 8% will be charged on ceramic tiles manufactured in a factory not using electricity for firing the kiln on the condition that "if no credit of the duty paid on the inputs used in or in relation to the manufacture of such ceramic tiles has been taken under rule 3 or rule 13 of the CENVAT Credit Rules, 2004". Representations have been received from trade & industry stating that objections are being raised by the field formations holding that taking of CENVAT credit on inputs services would violate the condition of the notification.

1. The matter has been examined. It is hereby clarified that the notification debars taking of credit on inputs and not on input services. Further input and input services are separately defined in the CENVAT Credit Rules, 2004 and the term 'input' does not include 'input services'. Therefore, taking of credit on input service would not violate the condition of notification.

2. Attention is also invited to the classification of abrasive stones for the purpose of availing CENVAT credit. It may be recalled that till the operation of 6 digit Central Excise Tariff (CET), abrasive stones were classifiable under 680110 and were covered under the definition of capital goods as per Rule 2(a)(A)(i) of CENVAT Credit Rules, 2004. However, after the introduction of 8 digits CET, with effect from 28.2.2005, abrasive stones were classified under 6805. Therefore, a view was taken that the abrasive stones came out of purview of capital

goods after 28.2.2005. Vide Notification. No. 7/2007 – CE. (NT), dated 21.2.2007, the heading 6805 was included in the definition of capital goods. Representations have been received from the trade & industry that because of non –coverage of abrasive stones under the definition of 'capital goods' during the period 28.2.2005 to 20.2.2007, the field formations are taking a view that these goods are in the nature of 'input', therefore, the credit taken on such abrasive stones during this period, disentitles the units from availing benefit of Notification No. 5/2006-C.E.

2.1 The matter has been examined. The Notification No. 7/2005-C.E. (N.T.), dated 24.2.2005 was issued to take care of such issues arising due to transition from 6 digit to 8 digit CET. Under the said notification, Central Excise (Removal of Difficulties) Rules, 2005 have been notified. The said Rules provides that the reference to erstwhile chapter, heading, sub-heading or tariff item under 6 digit CET shall be deemed to have been substituted by the corresponding new chapter, headings, sub-heading or tariff item under the 8 digit CET in any of the rules made under Section 37 of the Central Excise Act. The CENVAT Credit Rules have also been framed under Section 37 of the Central Excise Act. Therefore, it is clarified that abrasive stones which were classified under heading 680110 under 6 digit tariff, would be treated as capital goods even though the same were classified under heading 6805 in the eight digit tariff for the period 28.2.2005 to 21.2.2007. Therefore, benefit of notification cannot be denied on this ground.

(c) <u>Ceramic tiles industry – CENVAT credit on alumina balls/ ceramic pebbles, bolting cloth/screens/silicon cylinders</u> – [C.B.E. & C. Circular No. 920 /10/2010 – CX., dated 1.4.2010]

1. Representations have been received from field formations and industry seeking clarification as to whether items, namely, alumina balls / ceramic pebbles which are grinding media used in ball mills in the

ceramic tile industry should be treated as capital goods or input under the provisions of CENVAT Credit Rules. On the other items too, namely, bolting cloth / screens / silicon cylinders which carry designs and which are fitted on the machines used for printing of design over the surface of the tiles, doubts have arisen as to whether these should be considered as capital goods or inputs. Classification of these items as capital goods or inputs is also relevant because a concessional rate of excise duty is available to a tile manufacturer subject to the condition that no CENVAT credit on inputs used in the manufacture of ceramic tiles is taken.

The issue has been examined. It has been reported that alumina balls / ceramic pebbles are essential to run the ball mill in the ceramic tile factory and the ball mill cannot function without the grinding media. Therefore, alumina balls / ceramic pebbles which are grinding media should be considered as component / part of the machines to be classified as capital goods for CENVAT credit purposes. Similarly, bolting cloth / screens / silicon cylinders which carry designs and which are fitted on the machines used for printing of designs are also essential for operating of the machines. Therefore, these items would also be considered as capital goods for the purpose of CENVAT Credit Rules, being part / component of the machines.

4.13 Some judicial rulings

(a) Fuel storage tanks are eligible capital goods for MODVAT credit irrespective of the classification made by supplier – Rule 57Q of Central Excise Rules, 1944, Rules 2(a) and 3 of CENVAT Credit Rules, 2004.

[CCE vs. Decora Ceramics Ltd. (2007) 7 STR 124 (Tri – Mumbai)].

(b) Motor Vehicles – For CENVAT credit entitlement of service provider – Transportation crucial to courier service – Courier

agency rendering taxable service entitled to CENVAT credit of the duty paid on motor vehicles – Rules 2(a) and 3 of CENVAT Credit Rules, 2004.

[TNT India Private Limited v. (2007) 7 STR 142 (Tri – Bang.)].

(c) Movement of capital goods after availment of credit – capital goods were moved only between appellant's own units, and that too for use in the manufacture of the same final goods – No disposal or alienation of capital goods to warrant return / denial of credit – Impugned order set aside – Rule 4 of CENVAT Credit Rules, 2004.

[Pooja Forge Ltd. v. (2007) 8 STR 318 (Tri – Del)].

(d) Towers and their parts, pre-fabricated shelters, printers and office chairs used in providing cellular telephone service held as not capital goods for providing output service and credit of excise duty paid thereon denied – Prima facie case made out on admissibility of the credit and waiver of pre-deposit in respect of credit on towers and its parts and pre-fabricated shelter.

[Bharati Tele Ventures Ltd. v. CCE (2008) 9 STR 73 (Tri – Mumbai)]

(e) Components and parts of capital goods bought / manufactured by the contractor and invoices issued in the name of manufacturer – Manufacturer used such components and parts for setting up a sugar plant in assessee's premises – Assessee entitled to the credit of the duty paid on such components and parts – Rule 57Q of Central Excise Rules, 1944, Rules 2(a) and 3 of CENVAT Credit Rules, 2004.

[Rajarambapu Patil SSK Ltd. v. CCE (2008 (11) 11 STR 437 (Tri Mumbai]).

(f) Electrical transformer used by an assessee is part of plant and machinery, used for bringing about change in substance for the manufacture of final product – Capital goods entitled for credit under Rule 57Q of Central Excise Rules, 1944 Rules 2(a) and 4 of CENVAT Credit Rules, 2004.

[CCE vs. Jai Forgings and Stamping (P) Ltd. (2008) 11 STR 423 (P & H)].

(g) Buildings and sheds whether capital goods – Buildings and sheds not covered under capital goods as per definition in the rules – Rule 2(a) of CENVAT Credit Rules, 2004.

[In Re : VMT Spinning Co. Ltd. (2008) 12 STR 388 (AAR)].

(h) Components and accessories of machines and equipments Channels, Plain Sheets, HR Sheets and Angles are capital goods eligible for MODVAT Credit – Rule 57Q of Central Excise Rules, 1944 – Rule 3 of CENVAT Credit Rules, 2004.

[Uttam Sugar Mills Ltd. v. CCE (2008) 12 STR 197 (Tri – Del)].

(i) CENVAT credit available on forged products, blooms, billets, chequered plates, GC Sheets, flats and MS plates used in the manufacture of parts of capital goods in factory and the same further used in factory along with capital goods.

Mafrolite, high alumina refractory cement and aluminium ferrules used in lining of furnace as refractory material eligible for credit.

[Steel Authority of India Vs CCE (2008 (227) ELT 265 (Tri-Del)].

CHAPTER V

Input Services

5.1 Brief analysis of "input services" definition [Rule 2(l) of CENVAT Credit Rules, 2004]

(a) First leg of statutory definition

"Input Service" means any service -

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products, up to the place of removal. (The phrase "clearance of final products up to the place of removal" replaced the earlier phrase "clearance of final products from the place of removal" with effect from 01.04.2008).

A careful reading of the above would show that there is a clear distinction in terminology employed for service provider as compared to manufacturer of final products.

(b) Inclusive portion of definition

The second leg of the "input service" definition can be bifurcated as under and includes :

(i) Services used in relation to setting up, modernization, renovation or repairs of a factory, premises of service provider or an office relating to such factory or premises

(ii) Advertisement or Sales Promotion

(iii) Market Research

(iv) Storage up to the place of removal

(v) Procurement of inputs

(vi) Activities relating to business, such as accounting, auditing, financing, recruitment and quality control,

coaching and training, compute networking, credit rating, shares registry and security

(vii) Inward transportation of inputs or capital goods and their outward transportation up to place of removal.

(c) Analysis of "in relation to"

In the case of Tamil Nadu Kalyana Mandapam Assn. vs. UOI (2004) 167 ELT 3 (SC), the Apex Court has confirmed a wide connotation of the terminology "in relation to". In a recently decided case viz. All India Federation of Tax Practitioners vs. UOI (2007) 7 STR 625 (SC) the Apex Court has observed that the words "in relation to" and "with respect to" provide a wide amplitude but the context in which each words is used has to be kept in mind.

(d) Analysis of "for"

It would appear that, the words "for providing any output service" would have a wide connotation. Reference can be made to CIT vs. Malayalam Plantations Ltd. (1964) 53 ITR 140 (SC).

(e) Analysis of "and includes"

The term "and includes" used in the definition of "input services" is indicative of a wide scope of the definition. Several judicial rulings have considered the meaning of word 'includes' or 'and includes'.

On an analysis of judicial rulings, it can be summarized that definitions which employ the words "includes," generally would have three effects:

- It usually extends and expands the meaning beyond the normal understanding of the word defined.

  [Dilworth vs. Commissioner of Stamps (1889 AC 99); Taj Mahal Hotel vs. CIT AIR 1969 AP 84 -followed in other cases].

- It may restrict the meaning to the enumerated categories.

  [Refer South Gujarat Roofing Tiles Manufacturers' Association vs. State of Gujarat AIR 1977 SC 90;

Mahalakshmi Oil Mills vs. State of Andhra Pradesh (1988) affirmed in 38 ELT 714 (SC)].

- It may merely clarify the normal meaning

  [Jeep Flashlight Industries vs. UOI (1985) 19 ELT 68 (All.) affirmed in 22 ELT 3 (SC)].

(f) Analysis of "such as"

The terminology "such as" used in the definition of "input services" is clearly indicative of the fact that the services specified in the definition, are illustrative and not exhaustive.

[Reference can be made to Royal Hatcheries vs. State of A.P (1994) 92 STC 239 (SC)].

The word "such as" act as an adjective prefixed to a noun indicative of the draftsman's intention that he is assigning the same meaning or characteristics to the noun as has been previously indicated, but it does not prohibit any other activity which can define noun in a similar way.

[(GTC Industries Ltd vs. CCE Mumbai V 2008 (12) STR 468 (Tri-LB))].

5.2 User requirement

User requirements to be satisfied in the context of inputs and capital goods have been discussed in Para 3.2 – Chapter III and Para 4.3 Chapter IV respectively. Goods are tangible and amenable to physical use. However, services are essentially intangible. Hence, the user requirement to be satisfied for availment of credit under CENVAT Credit Rules, 2004, does pose difficulties inasmuch as there are no clear judicial legal precedents as regards the concept of "use of service". The law on "use of service" is under evolution.

However, the following may be noted :

- It has been judicially held that availing benefit / the act of taking advantage of commodities/services would constitute use/ consumption.

  [Refer - Burma Shell Co vs. Belgaum Municipality, AIR 1963 SC 906; Anwar Khan Mehboob Ltd vs. State of Bombay (1960) 11 STC 698 (SC)]

- The principles of potential use / passive use / ready to use laid down from time to time would be relevant.

- The principles laid down under OECD [Organisation for Economic Co- operation and Development] guidelines would be relevant.

5.3 Nexus test – Whether necessary

(a) In the case of Coca Cola India Pvt. Ltd (2007) 7 STR 529 (Tri – Mum), appellants were manufacturing concentrates to be used by bottlers in the production of aerated water. An issue arose as to whether advertisement charges incurred by the appellant for the promotion of aerated water, would be considered as input service. The Mumbai CESTAT considering the definition of "input service", held as under:

"Since appellant is manufacturing and removing concentrates for which no advertisement was undertaken by them, they are not entitled to take credit of service tax paid on advertisement of aerated water manufactured by bottlers. To be an input service, advertisement must be undertaken for sale and promotion of final products of appellants only and not of others. Accordingly credit of service tax paid on advertisement charges was held as inadmissible as the same is not an input service". [This ruling has been reversed – Refer Para 5.4(b) hereafter].

(b) The Supreme Court has laid down a very important principle in CCE vs. Dai Ichi Karkaria Ltd (1999) 112 ELT 353 (SC) that MODVAT / CENVAT Scheme does not envisage one to one correlation between inputs and outputs. This principle is very much relevant for CENVAT Credit Rules, 2004 as well.

(c) The definitions of "input" and "input service" have to be satisfied in order to consider availing CENVAT credits, one-to-one correlation between the input and output or between input service and output service is not specifically sought by the concerned definitions.

5.4 Scope of definition – Whether wide or restricted

(a) Though, it would appear that the scope of "input services" eligible to CENVAT credit is wide, disputes are being raised by service tax authorities as to the eligibility of CENVAT credit availed in regard to service tax paid on wide range of input services relating to business of a manufacturer of final products / service provider.

In the case of CCE vs. Mahindra Sona Ltd (2008) 10 STR 256 (Tri. Mumbai) the Mumbai Tribunal held that catering / canteen services are neither used in or in relation to the manufacture or clearance of final products nor can it be said to be an activity relating to business. Hence the same is not covered within the definition of "input service".

However, in a subsequently decided case of Victor Gaskets India Ltd vs. CCE (2008) 10 STR 369 (Tri. Mumbai) which was also approved in GTC Industries vs. CCE 2008 (12) STR 468 (Tri-LB), the eligibility of outdoor catering services to credit came up for consideration in detail. In the said case the appellant had availed credit of service tax paid to outdoor caterer running canteen in factory premises on the ground that manufacturer / service provider is entitled to take credit of service tax paid on business related activities specified in expanded inclusive definition of input service – services of coaching and training, credit rating, etc. not related, directly or indirectly to the manufacture but the credit is admissible as being activities related to business. After detailed discussions, the Tribunal held as under:

- Catering services provided in canteen within factory premises exclusively for workers is an activity in relation to business of appellants and hence is an input service eligible to CENVAT credit.
- Meaning assigned to input service is divided into two parts – First part giving specific meaning and second part giving inclusive meaning – Expanded part of definition is inclusive and not an exhaustive list of activities on which input service credit can be taken.
- Levy of Fringe Benefit Tax (FBT) is on business expenses. Accordingly, it was appellant's contention that since payment of FBT is required on canteen expenses under income-tax, canteen activity is covered under the activities relating to business. The said contention was found acceptable for availment of CENVAT credit.
- Expression 'such as' in Rule 2(l) of CENVAT Credit Rules, 2004 means stipulated activities that follow the expression are only illustrations and not limitations [Good Year India Ltd (1997) 95 ELT 450 (SC) relied].

- It is pertinent to note that while deciding the case, the Tribunal referred to the following rulings under income-tax:
- ITAT vs. B Hill and Co. Pvt. Ltd. (1983) 142 ITR 185 (All) wherein the expenditure incurred on restoration of buildings and residential quarters was held allowable as business expenditure.
- Greaves Cotton & Co. Ltd vs. CIT (2005) 279 ITR 42 (BOM) wherein expenditure incurred on the maintenance of transit quarters used for accommodating employees visiting Bombay was held allowable as business expenditure.
- The Larger Bench in GTC Industries' case observed as under :-

  In regard to denial of CENVAT credit on outdoor catering service in the canteen of manufacturer on the ground that such service is not specifically specified in second part of definition under rule 2(l) of CENVAT Credit Rules, 2004 and hence not covered under input service definition, it was observed that the expenses towards canteen and provision of subsidized canteen form part of cost of the production as evident from Para 4.1 of CAS – 4 issued by the Institute of Cost and Works Accountants of India. Further, it is mandatory on the part of factories to provide canteen facility and failure to do so attracts prosecution and penalty under Section 92 of Factories Act, 1948. Cost of food forms a part of expenditure incurred having bearing on cost of production. Outdoor caterer providing catering services was held as input service relating to business and hence CENVAT credit admissible.

  Every clause of the statute should be construed with reference to the context in which it is issued. Bare mechanical interpretation of words and application of legislative intent, devoid of concept and purpose, reduces most of the remedial and beneficial legislations to futility.

(b) In a landmark ruling, the Bombay High Court in Coca Cola India Pvt Ltd. v. CCE (2009) 15 STR 657 (Bom) held that though the contents of advertisements made by the appellants, a

manufacturer of 'concentrates', essentially featured the 'bottle of aerated waters' (the bottles being the final products manufactured by bottlers and not the appellants) the credit on advertising services received by the appellant cannot be denied on the ground that the advertisement is not of the final product of the appellants viz., 'concentrates' but of the 'aerated waters' which are manufactured by bottlers. The High Court laid down the following propositions –

(i) The definition of 'input service' under rule 2(1) can be conveniently divided into the following five independent limbs :

- Any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products,
- Any service used by the manufacturer whether directly or indirectly, in or in relation to clearance of final products from the place of removal,
- Services used in relation to setting up, modernization, renovation or repairs of a factory, or an office relating to such factory,
- Services used in relation to advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs,
- Services used in relation to activities relating to business and outward transportation upto the place of removal.

Each of the above limbs of the above definition is an independent benefit / concession. If an assessee can satisfy any one of the above, then credit on input service would be admissible even if the assessee does not satisfy the other limbs.

(ii) The definition of "input service" which is expressed in the form of "means".. and "includes"…, would cover even those services in the 'inclusive part which otherwise would not come within the ambit of the 'means' part.

(iii) The phrase "activities relating to business such as accounting, auditing, financing,…" are words of wide import. The expression 'such as' is illustrative and not exhaustive of services related to 'business'. The word 'business' is also of wide import and cannot be given a restricted definition to say that business of a manufacturer is to manufacture final products only. In the present case, the business of the appellant would include apart from manufacture of concentrates, also entering into franchise agreements with bottlers, permitting use of brand name, promotion of brand name, etc. The expression 'relation to further widens the scope of the expression 'activities relating to business' and therefore all activities (essential or not) in relation to a business would fall within the ambit of input service and in the present case all activities having a relation with the manufacturer of a concentrate would fall within the definition of input service.

(iv) Service tax is a value added tax and a consumption tax and the burden of service tax must be borne by the ultimate consumer and not by any intermediary i.e. the manufacturer or service provider. In order to avoid the cascading effect CENVAT credit on input stage goods and services must be allowed as long as a connection between the input stage goods and services is established. Conceptually as well as a matter of policy, any input service that forms a part of value of final product should be eligible for the benefit of CENVAT credit. In the present case, since the advertising cost forms part of the assessable value the assessee is eligible to take credit of tax paid on advertising services.

(v) So long as the manufacturer can demonstrate that the advertisement services availed have an effect or impact on the manufacture of the final product and establish the relationship between the input service and the manufacture of final product, credit must be allowed. In the present case, Court held that the advertisement of soft-drink enhanced the marketability of the concentrate

[Pepsi Foods Ltd. v. CCE (2003) 158 ELT 552 (SC); Philips India Ltd. v. CCE (1997) 91 ELT 540 (SC); and Explanatory Notes to HSN – heading 21.06 relied on].

(c) Some of the Tribunal rulings with regard to interpretation of "input services" eligible to CENVAT credit are a matter of concern. In Chemplast Sanmar Ltd. v. CCE (2010) 17 STR 253, the Chennai CESTAT has observed that, "input services" definition including activities relating to business cannot be interpreted to include post manufacturing activities. Section 37(2) of the Central Excise Act, 1944, as enabling provision, empowers the Government to make rules for providing credit of service tax paid or payable on taxable services used in relation to manufacture of excisable goods. Therefore, services used by a manufacturer subsequent to completion of manufacture and sale of goods cannot be considered as input services in or in relation to manufacture.

In Bangalore CESTAT in Kbace Tech Pvt. Ltd. (2010) 18 STR 281, a narrow interpretation of "input service" is sought to be made on the basis of Supreme Court's ruling in Maruti Suzuki Ltd. v CCE (2009) 240 ELT 41 (SC) in the context of "inputs".

In CCE v. Manikgarh Cements Works (2010) 18 STR 275 (Tri – Mumbai), the Tribunal, by observing that Bombay High Court's ruling in Coca Cola India Pvt. Ltd. v. CCE (2009) 15 STR 567 (Bom) case has been impliedly overruled by Supreme Court's ruling in Maruti Suzuki case in regard to inputs, has given a narrow interpretation on the scope of 'input service'. This ruling has been distinguished by the Tribunal in a subsequent ruling in Semco Electrical in (2010) 18 STR 177 (Tri). However, the Mumbai CESTAT's ruling in Semco Electrical, has been recently disagreed to by the Chennai CESTAT in CCE v. Sundaram Brake Linings (2010) 19 STR 172.

Hence, a huge judicial controversy has been created as to the interpretation of input service which has substantial implications. However, it appears that principles laid down by the Bombay High Court in Coca Cola case to the effect that scope of services is very wide are more relevant. It is hoped that matter would soon be referred to a Larger Bench for fast resolution.

5.5 CENVAT Credit on outward transportation

The CENVAT credit of the service tax paid on outward transportation has been a subject matter of endless litigation due to the use of the phrase "inward transportation of inputs or capital goods and outward

transportation up to place of removal" in the definition on "input service". The litigation is centered around "place of removal" as that would determine the assessee's eligibility to CENVAT credit of service tax paid on outward transportation.

5.5.1 Departmental clarifications – CBEC Circular No. 97/8/2007 ST dated. 23.8.07

Para 8.1

(a) Issue – Whether a consignee can take the credit of the amount paid as service tax either by himself (as consignee) or by the consignor or by the goods transport agency (GTA)?

Comments – As per Rule 3 of the CENVAT Credit Rules, 2004, CENVAT credit of, inter alia, service tax leviable and paid on any 'input services' can be taken. The rule does not distinguish as to who (i.e. the GTA, the consignor or the consignee himself) has paid the aforesaid tax. The only condition required to be satisfied is that the consignee must be a manufacturer of excisable goods or a provider of taxable service and the service must be in the nature of 'input service' for such activity. In case of inward transportation of inputs or capital goods, such service (being specifically mentioned under the definition of 'input service') would qualify to be called as input service' and, thus, the service tax paid (by any of the persons mentioned above) would be eligible as the credit to the receiver if he is either a manufacturer of excisable goods or a provider of taxable service.

(b) Issue – Up to what stage a manufacturer / consignor can take the credit on the service tax paid on the goods transport by road ?

Comments – This issue has been examined in great detail by the CESTAT in the case of M/s. Gujarat Ambuja Cements Ltd vs. CCE, Ludhiana [2007 (006) STR 0249 Tri – D]. In this case, CESTAT has made the following observations: -

> *"the post sale transport of manufactured goods is not an input service for the manufacturer / consignor. The two clauses in the definition of 'input services' take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation upto the place of*

removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit upto the place of removal. When these two clauses are read together, it becomes clear that transport service credit cannot go beyond transport upto the place of removal. The two clauses, the one dealing with general provision and other dealing with a specific item, are not to be read disjunctively so as to bring about conflict to defeat the laws scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions".

Similarly, in the case of M/s. Ultratech Cements Ltd. vs. CCE Bhavnagar 2007 – TOIL – 429 – CESTAT – AHM, it was held that after the final products are cleared from the place of removal, there will be no scope of subsequent use of service to be treated as input service. The above observations and views explain the scope of the relevant provisions clearly, correctly and in accordance with the legal provisions. In conclusion, a manufacturer / consignor can take the credit on the service tax paid on outward transport of goods up to the place of removal and not beyond that.

Para 8.2

In this connection, the phrase 'place of removal' needs determination taking into account the facts of an individual case and the applicable provisions. The phrase 'place of removal' has not been defined in CENVAT Credit Rules, 2004. In terms of sub-rule (t) of rule 2 of the said rules, if any words or expressions are used in the CENVAT Credit Rules, 2004, and are not defined therein but are defined in the Central Excise Act, 1944, or the Finance Act, 1994, they shall have the same meaning assigned to them in those Acts.

It is, therefore, clear that for a manufacturer / consignor, the eligibility to avail the credit of the service tax paid on the transportation during removal of excisable goods would depend upon the place of removal as per the definition. In case of a factory gate sale, the sale from a non-duty paid warehouse, or from a duty paid depot (from where the excisable goods are sold, after their clearance from the factory), the determination of the 'place of removal' does not pose much problem. However, there may be situations where the manufacturer / consignor claims that the sale has taken place at the destination point because

in terms of the sale contract / agreement (i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in an acceptable condition to the purchaser at his door step; (ii) the seller bore the risk of loss of or damage to the goods during transit to the destination. (iii) the freight charges were an integral part of the price of goods. In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant of such a credit that the sale and the transfer of property in goods (in terms of the definition as under section 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place.

5.5.2 Concept of place of removal

(a) On a question whether transporting his goods from his factory to the customer's premises would be "input service", Delhi CESTAT in Gujarat Ambuja Cements Ltd. vs. CCE (2007) 6 STR 249 (Tri – Del.) answered in the negative and held as under :

- "transportation" is different from the activity of "clearance" of final products from the place of removal.
- The inclusive part of the definition is restrictive as it permits such transportation up to the place of removal only as input service.

However, in a subsequently decided case, the Bangalore CESTAT in India Cements Ltd. vs. CCE (2007) 216 ELT 81 (Tri – Bang.) disagreed with the above stated view of Delhi CESTAT by observing that in its view the transportation activity would come within the first limb viz., "clearance of final products from the place of removal". However, in view of the conflicting judicial rulings the matter had been referred to a Larger Bench of CESTAT.

However, the above stated Delhi Tribunal ruling in Gujarat Ambuja's case has been reversed by the Punjab & Haryana High Court in Ambuja Cements Ltd. v. UOI (2009) 14 STR 3 (P & H) which held as under :

(i) C.B.E & C. Circular No. 97/6/2007 – S.T. dated 23.8.2007 clarifying impugned issue, binding on Department – Credit admissible if ownership of goods

remain with seller till delivery at customer's doorstep – Transit insurance borne by appellant and property in goods not transferred to buyer till delivery – Freight charges forming part of value of excisable goods and borne by appellant as sale on FOR destination basis – Outward transportation upto place of removal defined as input service during material period – All three conditions in circular satisfied – Credit admissible - Rule 2(l) and 14 of CENVAT Credit Rules, 2004.

(ii) C.B.E. & C. Circulars are binding on Department – Revenue precluded from challenging correctness of circular even on ground of it being inconsistent with statutory provision – Section 37B of Central Excise Act, 1944 as applicable to service tax vide Section 83 of Finance Act, 1994.

(b) Rule 2 (l) of the CENVAT Credit Rules, 2004 defining "input service" has been amended w.e.f. 1.4.2008, to restrict CENVAT credit of the service tax paid on the services used for clearance of final products only "up to the place of removal". It would reasonably appear that, w.e.f. 1.4.2008, services of transportation (even if held to be for clearance) of finished goods from the factory (place of removal) to the premises of the customer would not be considered as input services for the purpose of availing CENVAT credit.

However, even after the amendment w.e.f. 1.4.2008, it is still being debated, as to whether outward transportation beyond the place of removal could constitute eligible input service inasmuch as it is an activity relating to business.

(c) Larger Bench ruling in ABB Ltd. v CCE & ST (2009) 15 STR 23 (Tri – LB) - While examining allowability of CENVAT credit, service tax paid on outward transportation service for movement of final products from the place of removal till the customer's place, it was observed that the definition of input service could be conveniently divided into the following five categories vis-à-vis the manufacturers.

- Any service used by the manufacturer, whether directly or indirectly, in or in relation to the final products.

- Any service used by the manufacturer, whether directly or indirectly, in or in relation to clearance of final products from the place of removal.
- Services used in relation to setting up, modernization, renovation or repairs of a factory, **or** an office relating to such factory.
- Services used in relation to advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs.
- Services used in relation to activities relating to business and outward transportation upto the place of removal.

On making the above division, the Larger Bench observed that each of the above was an independent benefit or concession and even if one was satisfied, the credit on input service would be admissible.

In this case also, the expression "activities relating to business" was analyzed in depth by examining the expression "in relation to" as analyzed in the case of Doypack Systems (P) Ltd. vs. UOI (1988) (36) ELT 201 (SC) and also examining the qualification 'activities' and the expression "such as".

In the case of ABB Ltd, the Bench relying on and discussing decisions of Supreme Court, held that when the general expression "activities relating to business" covered transportation upto the customer's place, credit could not be denied by relying on specific coverage of outward transportation upto the place of removal in the inclusive clause. According to the Bench, the principle laid down in various Supreme Court cases that a specific provision will override a general one did not apply to exemptions. On the basis of this contention, the Bench held that the revenue's view was incorrect to contend that "since outward transportation was specifically mentioned in the inclusive clause of the definition, credit for outward transportation could not be allowed with reference to other general limb of the definition. Also, in this decision, there was a categorical observation by the Larger Bench as to the wide import of the word 'business' as held in the case of Mazagaon Dock Ltd. vs. CIT (AIR 1958 SC 861).

The LB reached the conclusion by stating that the use of the expression "outward transportation" in the inclusive clause was by way of abundant caution so as to avoid any dispute being raised on the 'means' clause (which refers to clearance from place of removal).

According to the LB in ABB's case, as opposed to the decision in the case of GTC discussed above, there was no requirement in law that the cost of freight should have entered transaction value to qualify for admissibility of credit or stated in other words non-inclusion of a particular cost in the transaction value by itself is not a limiting factor for admissibility of credit as the issue did not relate to valuation of excisable goods and the issue of 'valuation' and CENVAT credit were independent of each other.

(d) However, it needs to be expressly noted that LB ruling in ABB Ltd has been stayed by the Karnataka High Court (244 ELT A91).

Hence, there is no judicial finality on the issue of CENVAT credit entitlement on outward transportation.

5.6 Other Departmental Clarifications

(a) CBEC Circular No. 97/8/2007 dated 23.8.07

Para 8.3

A doubt was raised regarding the admissibility of CENVAT credit on the service tax paid in respect of mobile phones. In the Service Tax Credit Rules, 2002, it was prescribed that the credit of service tax was admissible only on telephone connection installed in the business premises. A clarification to this effect was also issued vide Circular No. 59/8/2003-ST. dated 20.6.2003, in the context of the Service Tax Credit Rules, 2002. However, in the CENVAT Credit Rules, 2004, no such condition has been prescribed. Therefore, w.e.f. 10.9.2004, the credit of service tax paid in respect of mobile telephone service is admissible, provided the mobile phone is used for providing output service or used in or in relation to the manufacture of finished goods.

(b) CBEC Circular No. 96/7/2007 dated 23.8.07

Reference Code	Issue	Clarification
097.01 / 23.08.07	Whether CENVAT credit of duty paid on capital goods and service tax paid on input services can be taken by a service provider who opts to pay an amount equivalent to two per cent of the gross amount charged for the works contract instead of paying service tax at the rate specified in Section 66, under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, notified vide Notification No.32 / 2007 – Service Tax, dated 22.5.2007?	Rule 3(2) of the Works Contract (Composition Scheme for Payment of Service tax) Rules, 2007 provides that the provider of taxable service opting to pay service tax under the composition scheme is not entitled to take CENVAT credit of duty on the inputs used in or in relation to the said works contract, under the provision of the CENVAT Credit Rules, 2004. There is no restriction under Notification No. 32/2007 – ST dated 22.5.07 to take CENVAT credit of duty paid on capital goods and service tax paid on input services.

(c) CBEC Circular No. 96/7/2007 dated 23.8.07 [as amended vide Circular dated 4.1.2008]

Reference Code	Issue	Clarification
096.01 / 04.01.08	Commercial or industrial construction service [Section 65(105)(zzq)] or works contract service [Section 65(105)(zzzza] is used for the construction of an immovable property. Renting of an immovable property is leviable to service tax [Section 65 (105)(zzzz)]. Whether or not, commercial or industrial construction service or works contract service used for the construction of an immovable property, could be treated as input service for the output service namely renting of immovable property service under the CENVAT Credit Rules, 2004?	Right to use immovable property is leviable to service tax under renting of immovable property service. Commercial or industrial construction service or works contract service is an input service for the output namely immovable property. Immovable property is neither subjected to central excise duty nor to service tax. Input credit of service tax can be taken only if the output is a 'service' liable to service tax or 'goods' liable to excise duty. Since immovable property is neither 'service' nor 'goods' liable to excise duty, input credit cannot be taken.

However, one would have to wait and see whether the Tribunal/Courts hold the same view.

It is also worthwhile to note that circulars cannot take away the effect of notifications statutorily issued as held by the Supreme Court in Sandur Micro Circuits Ltd Vs CCE Belgaum [(2008 (229) ELT 641 (SC))].

5.7 Other judicial rulings under service tax

(a) Input service – Distinction between manufacture and service - Manufacture and sale of CT / TMT bars not to be treated as a service - Appellant's franchise business of brand name has nothing to do with its manufacturing activity for purposes of CENVAT credit but advertisement activity is in relation to manufacture, hence advertisement was an input service – Service tax paid on advertisement is available as CENVAT credit.

[Kamdhenu Ispat Ltd. vs. Commissioner (2007) 8 STR 188 (Tri – Del.)].

(b) Appellant dispatched finished goods by using services of courier – Charges are for delivery of finished goods, akin to outward transportation from the factory of appellant to their customers – Input stage CENVAT credit on outward transportation not permissible.

[Universal Cables Ltd. vs. Commissioner (2007) 7 STR 310 (Tri. – Del)].

(c) Credit of the service tax paid on erection, commissioning and installation of windmills for generation of electricity away from factory premises – Electricity is not excisable – Electricity generated surrendered to the grid and equivalent quantum is withdrawn in the factory from the grid- Services used at site of windmills cannot be held as input services by the unit located far away – As electricity is not excisable, CENVAT credit not available even at premises of windmills – CENVAT credit of service tax not admissible.

[Rajhans Metals (P) Ltd. vs. Commissioner (2007) 8 STR 498 (Tri. Ahmd.)].

(d) Internet connection provided at Satna but the bill for payment purposes sent to head office of appellant – Credit on input

service of internet services cannot be denied inasmuch as internet services are utilized for information related to manufacture, sale and dispatch instructions, in current age of Information Technology.

[Universal Cables Ltd. vs. Commissioner (2007) 7 STR 310 (Tri. Del)].

(e) Mobile phone - Service tax paid thereon is available as credit to eligible service providers of output service and manufacturers in absence of any express prohibition under CENVAT Credit Rules, 2004, applicable during the material time – Board's old Circular No. 59/8/2003 – S.T., dated 20.6.2003 cannot be pressed into service against appellants.

[Indian Rayon & Industries Ltd. vs. CCE. (2006) 4 STR 79 (Tri. Mumbai)].

(f) Repair and maintenance service used for residential colony by appellant - manufacturer – Residential colony necessary as factory situated in remote area and presence of the workman on the spot required to maintain continuity in manufacture. Impugned service relatable to business. Hence, repairs and maintenance and civil construction for residential colony being input service, credit thereon admissible.

[Manikgarh Cement vs. CCE (2008) 9 S.T.R 554 (Tri – Mumbai)].

(g) Credit of the service tax on agent's commission, goods transport by road, advertising, clearing and forwarding, telephone, internet and courier charges – Any input service used by manufacturer whether directly or indirectly in or in relation to the manufacture and clearance from place of removal covered by definition and eligible for credit – Showroom is the place of removal as final product cleared to own showrooms and no sale at factory gate – Services used till the place of removal eligible for credit – CENVAT credit of service tax paid on impugned services eligible as credit.

[Metro Shoes Pvt. Ltd. vs. CCE (2008) 10 STR 382 (Tri. Mumbai)].

(h) Landline phones installed in Director's and company officials' residence, entitled for service tax credit as the bills are paid by company and telephones are used for business purpose.

[Keltech Energies Ltd. vs. CCE (2008) 10 STR 280 (Tri. – Bang)].

However, in M/s Kitply Industries Ltd. V. CCE Meerut-II 2010 – TIOL- 635- CESTAT- DEL, CENVAT credit has been disallowed on mobile phone bills not raised in the name of the assessee.

(i) Equipment hiring, professional consultation service, recruitment service, security service, telephone service, transport service, training service, facility operation service, courier services, cafeteria service and advertisement service can rightly be termed as 'input service' used by respondent to provide output service – Once they are input services and when output service taxable, then definitely entitled for credit.

[CCE v Deloitte Tax Services India Pvt. Ltd. (2008) 11 STR 266 (Tri – Bang)].

(j) CENVAT credit of service tax paid on pandal or shamiana service and photography service – The said expenses incurred in holding Kannada Rajyostava function and inaugural function of police station – Expression 'activities relating to business' in Rule 2(l) of CENVAT Credit Rules, 2004, amplified by words 'such as' – Social functions to entertain employees for Rajyostava function and inauguration of police station not covered under 'activities relating to business' as they do not keep company with other terms used.

[Toyota Kirloskar Motor P. Ltd. v. CCE (2008) 12 STR 498 (Tri. – Bang)].

(k) Mobile phones provided by the respondent to employees – Records not showing that activities carried out by employees not relatable to manufacture – Mobile service provider, as person liable to pay service tax and recovering tax, is the person providing taxable service and rendering output service which constitutes input service in the hands of the respondent – Ground for denial of credit that impugned phones were not installed in factory premises, not germane to relevant provisions – Question of law absent.

[CCE v. Excel Crop Care Ltd. (2008) 12 STR 436 (Gujarat)].

(l) CENVAT credit of service tax admissible - input service - Rent-a-cab service used for bringing employees to work in the factory for the manufacture of goods - Input service as defined

under Rule 2(l) of CENVAT Credit Rules, 2004, includes a plethora of other services such as service used directly or indirectly in relation to manufacture - Hence, Rent-a- cab service to be considered as being used indirectly in relation to the manufacture or as part of business activity for promoting business as any facility given to employees will result in greater efficiency and promotion of business - Credit admissible.

[Cable Corporation of India Ltd Vs CCE Nasik (2008 (12) STR 598 (Tri-MUM))].

(m) CENVAT credit of service tax - input service - Credit of service tax paid on Goods Transport Agency (GTA) service availed for the transportation of finished goods from factory to consignment agent's premises - Consignment agent premises also defined as place of removal – Property in goods never passes to consignment agent - Order of Commissioner allowing CENVAT credit of such service tax, upheld.

[Rajhans Metals (P) Ltd vs. CCE Rajkot (2008 (12) STR 597 (Tri- Ahm))].

(n) Medical and personal accident policy, group personal accident policy, insurance, personal accident policy, personal vehicle services, landscaping of factory garden and catering bills – Impugned items considered for costing final product in terms of CAS-4, therefore, contention that these services received in relation to manufacture of final product – Credit admissible – Rules 2(l) and 14 of CENVAT Credit Rules, 2004.

[Millipore India Ltd. v. CE (2009) 13 STR 616 (Tri. – Bang.)].

(o) Services provided by commission agent covered under 'input service' in terms of Rule 2(l) of CENVAT Credit Rules, 2004.

[CCE v. Bhilai Auxiliary Industries (2009) 14 STR 536 (Tri – Del)].

(p) Credit of service tax availed on services used for maintenance of staff colony – Security agency, labour supply, advertising, repair and maintenance, rent-a-cab, manpower recruitment and business auxiliary services involved – Appellant contending that factory situated in Scheduled Area and sale and purchase of land prohibited – Manufacture not feasible if residential

accommodation for employees not provided near factory – Expression "activities relating to business" in definition of input service encompasses services relating to not only manufacture but also business – Services received for maintaining residential staff colony to be considered as input services when appellant under obligation to maintain such colony – All services like lawn mowing, garbage cleaning, maintenance of swimming pool, collection of household garbage, harvest cutting, weeding, etc. are input services – Credit admissible – Rules 2(l) and 14 of CENVAT Credit Rules, 2004.

[ITC Ltd. v. CCE (2010) 17 STR 146 (Tri. – Bang.)].

(q) Technical testing and analysis services in respect of medicines which never reached the market – Trial manufacture of medicines and R&D conducted in respect of such drugs to be considered as part of the manufacturing and business activity – Credit admissible.

Clearing & forwarding agent service having a definite role to play in promotion of sales by storing the goods and supplying the same to the customers, actually promoting the sales – Service even though rendered beyond the place of removal of goods, credit admissible.

Foreign commission agent service being for sale promotion, credit admissible; and Maintenance and repair of photocopier, air conditioner, water cooler etc. – Without maintenance and repair or management, factory, cannot run - Credit admissible.

(Rule 2(l) of CENVAT Credit Rules, 2004.)

[Cadila Healthcare Ltd. v. CCE (2010) 17 STR 134 (Tri – Ahmd)].

5.8 Conclusion

It may be noted that due care should be taken while interpreting the definition of "input service" and many a time the facts and circumstances of each case would have to be considered before one can arrive at a conclusion regarding the availability or otherwise of credits of the service tax paid on certain services received by the manufacturer of final products or service provider.

CHAPTER VI

Specified Duties and Taxes Eligible to Credit

6.1 Specified duties and taxes

A manufacturer of final products or service provider is allowed to take CENVAT credit only in regard to duties and taxes specified under rules 3(1) of CENVAT Credit Rules, 2004. The specified duties and taxes eligible for availment of CENVAT credit are as under:

(a) Duty of excise specified in the First Schedule to Central Excise Tariff Act, 1985, leviable under Central Excise Act, 1944;

(b) Duty of excise specified in the second schedule to Central Excise Tariff Act, 1985, leviable under Central Excise Act, 1944;

(c) Additional duty of excise leviable under Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978;

(d) Additional duty of excise leviable under Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;

(e) National calamity contingent duty leviable under Section 136 of the Finance Act, 2001;

(f) Education cess (EC) on excisable goods leviable under Section 91 read with Section 93 of the Finance (No. 2) Act, 2004;

(g) Secondary higher education cess (SHEC) on excisable goods leviable under Section 136 read with Section 138 of the Finance Act, 2007;

(h) Additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under Clauses (a) to (g) above;

(i) Additional duty of excise leviable under Section 3(5) of the Customs Tariff Act;

(j) Additional duty of excise leviable under Section 157 of the Finance Act, 2003;

(k) Service tax leviable under Section 66 of the Act;

(l) EC on taxable services leviable under Section 91 read with Section 95 of the Finance (No.2) Act, 2004;

(m) SHEC on taxable services leviable under Section 136 read with Section 140 of the Finance Act, 2007;

(n) Additional duty of excise leviable under Section 85 of Finance Act, 2005.

6.2 Additional customs duty leviable under Section 3(5) of the Customs Tariff Act

(a) It has been specifically provided under Rule 3(1) (viia) of CENVAT Credit Rules, 2004 that, the benefit of CENVAT credit in regard to additional duty leviable under Section 3(5) of Customs Tariff Act, can be availed by a manufacturer of final products only. Accordingly, service provider cannot avail CENVAT credit in regard to the said additional duty. There does not appear to be any logical reasoning for discriminating service provider vis-à-vis manufacturer of final products.

(b) In view of refund mechanism introduced for 4% additional duty, vide Notification 102/2007 Cus dated 14.09.2007, it has been specifically provided under Rule 9(1) of CENVAT Credit Rules, 2004, that the benefit of CENVAT credit in regard to additional duty of customs levied under Section 3(5) of Customs Tariff Act shall not be allowed, if an invoice/ supplementary invoice bears an indication to the effect that no credit of additional duty shall be admissible.

6.3 Payment of specified duties and taxes

CENVAT credit is allowed in regard to specified duties and taxes paid on:

(a) Inputs or capital goods received in the factory of manufacturer of final products or premises of service provider on or after 10.9.2004.

(b) Input services received by a manufacturer of final products or service provider on or after 10.9.2004.

It may be noted that while the credit of excise duty on inputs and capital goods would be available on the receipt of the same in the factory premises of the output service provider, in case of input services, the credit of service tax would be admissible only on the payment of the full invoice towards value of the service and tax payable thereon to the service provider who provides the same.

For implications on default in payment to Government at the end of supplier refer Para 8.5 in Chapter VIII – Availment of Credit.

6.4 Wrong payments & credit admissibility

Some judicial rulings under central excise are given hereafter for reference :

(i) Duty paid by supplier of inputs – Department claiming that process undertaken by supplier did not amount to manufacture, and sum paid by him was not duty, and recipient of inputs was not entitled to its credit – But that sum neither refunded to him nor disputed by Department – Credit allowed to input receiver, especially as situation was Revenue neutral – Rule 3 of CCR, 2004.

[CCE v. Hylite Cables (2007) 212 ELT 284 (Tri – Ahmd.)]

(ii) Credit whether admissible on inputs not used in or in relation to manufacture of final product – Assessee considered as manufacturer and excise duty paid accordingly – Once assessee paid duty, he naturally becomes entitled to avail credit – Entries cancelled by each other and no prejudice caused to Revenue – Substantial question of law not arises – Appeal dismissed – Section 35G of Central Excise Act, 1944 – Rule 3 of CENVAT Credit Rules, 2004.

[CCE v. Rane NSK Steering Systems Ltd. (2009) 13 STR 327 (P&H)]

(iii) Manufacturer of inputs paid duty @ 24% instead of 16% – Buyer respondent whether entitled to CENVAT credit at higher rate of duty paid – Tribunal held that duty payment at higher rate not disputed by Department at supplier's end and hence, credit taken by buyer not variable – Duty paid by supplier @

24% and added in the cost paid by the respondent – Tribunal order, allowing credit, sustainable – Rule 3 of CCR, 2004.

[CCE v. Purity Flex Ltd. (2008) 9 STR 125 (GUJ)]

(iv) Credit of duty paid by job worker even though not required to be paid – Assessee taken credit which was actually paid – Revenue's appeal dismissed.

[CCE v. Ranbaxy Labs Ltd. (2006) 203 ELT 213 (P&H)]

(v) Amount paid by mistake in excess of duty – Such amount cannot be termed as duty, hence rule of time bar not applicable to excess amount paid over duty. Hence, refund held admissible – India Cements Ltd. v. Collector (1989) 41 ELT 358 (SC) relied.

[CCE v. Motorola India Pvt. Ltd. (2008) 11 STR 555 (KAR)]

(vi) For mistake in payment of duty by supplier, issue to be raised at suppliers end and not at appellants as they had taken CENVAT credit on the basis of invoice issued by supplier – CENVAT credit taken on basis of specified duty paying document not disallowable – Rules 4 and 9 of CCR, 2004.

[Parasrampuria Synthetics Ltd. v. CCE (2005) 191 ELT 899 (Tri – Del)].

(vii) Credit taken on duty paid by job worker on repaired / processed transformer oil and transformer – Job worker was not required to pay duty on repaired / reconditioned capital goods received by them under Rule 57S of erstwhile Central Excise Rules – Commissioner having jurisdiction over appellant's unit cannot revise or restrict credit admissible to appellants who received goods on payment of duty under cover of prescribed statutory document.

[SPIC (HCD) Ltd. v. CCE (2006) 201 ELT 386 (Tri – Chennai)].

6.5 Payments under reverse charge – Admissibility of CENVAT credit

(a) Departmental Clarification

Issues are being raised from time to time by some field formations as to CENVAT credit entitlement in regard to the payments made under reverse charge.

In this regard, clarifications issued vide CBEC Circular No 345/1/2008 – TRU dot 27.6.2008, are reproduced hereafter for ready reference:

1. Board vide Para 4.2.13 of letter F. No. B1/4/2006 dated 19.4.2006 [2006 (2) S.T.R. C5] clarified the admissibility of CENVAT credit of the service tax paid under Section 66A on the taxable services provided from outside India and received in India and used as input services for the taxable outputs, as follows :

   "4.2.13 The treatment of the recipient of service, as they are deemed service providers under Section 66A, is only for the purpose of charging service tax on the taxable services received from outside the country. Services provided from outside India and received in India, therefore, are not treated as taxable service provided by the recipient for the purpose of CENVAT Credit Rules, 2004. However, where such service is used as an input for providing any taxable output, the service tax paid on such service can be taken as input credit."

2. It has been brought to the notice of the Board by trade and industry associations that a view contrary to the said explanation has been expressed by field formations in certain cases.

3. Section 66A is the charging section and provides for the levy of the service tax on taxable services referred to in sub-clauses of clause (105) of Section 65. Services, specified in clause (105) of Section 65, provided by a person located in a country outside India and received by a service recipient in India are treated

   - as taxable services for the purpose of the levy of service tax in India;
   - as if the recipient of the service had himself provided the said services in India;

   Section 66A extends all the provisions of Chapter V of the Finance Act, 1994 to such a scenario where taxable services are provided from a country other than India and received in India. The recipient of such taxable

services is required to be registered as a person liable to pay service tax.

4. The recipient of the service is required to pay the service tax under Section 66A though the service is actually provided not by the recipient but by a person located in a country other than India. Such taxable services, not being actually provided by the person liable to pay the service tax, are not treated as 'output services' for the purpose of CENVAT Credit Rules, 2004. However, the service tax paid under Section 66A is available as 'input credit' under CENVAT Credit Rules, 2004, provided the said services are used as input services by the manufacturer or producer of final products or a provider of output service.

(b) <u>Judicial ruling</u>

Transfer of technology from abroad – Service tax paid as recipient – Held that tax so paid available as credit to them as they are deemed service provider.

[Jindal Steel & Power Ltd v CCE (2009) 14 STR 68 (Tri – Del)].

6.6 CENVAT credit when input price reduced after clearance – Departmental clarifications vide CBEC Circular No 877/15/2008 – CX dated 17.11.08

1. Representations have been received from trade and industry seeking clarification on the issue whether proportionate credit should be reversed in cases where a manufacturer avails the credit of the amount of duty paid by supplier as reflected in the excise invoice, but subsequently the supplier allows some trade discount or reduces the price, without reducing the duty paid by him.

2. The issue has been examined. Since, the discount in such cases is given in respect of the value of inputs and not in respect of the duty paid by the supplier, the effect of the reduction of the value of inputs may be that the duty required to be paid on the inputs was less than what has been actually paid by the inputs manufacturer. However, the fact remains that the inputs manufacturer had paid higher duty. Rule 3 of

CENVAT Credit Rules, 2004, allows the credit of the duty "paid" by the inputs manufacturer and not duty "payable" by the said manufacturer. There are many judgments of Hon'ble Tribunal in this regard, which have confirmed this view.

3. In view of above, it is clarified that in such cases, the entire amount of the duty paid by the manufacturer, as shown in the invoice, would be available as credit irrespective of the fact that subsequent to clearance of the goods, the price is reduced by way of discount or otherwise. However, if the duty paid is also reduced, along with the reduction in price, the reduced excise duty would only be available as the credit. It may, however, be confirmed that the supplier, who has paid the duty, has not filed/claimed the refund on account of the reduction in price.

CHAPTER VII

Restrictions on Credit Availment

7.1 Some of the important restrictions on availment of CENVAT credit are set out hereunder:

(a) CENVAT credit is not allowed on such quantity of inputs or input services which are used in the manufacture of exempted goods or provision of exempted services except in the manner specified. [Refer the discussion in Chapter XI – Proportionate credit mechanism].

(b) No CENVAT credit is allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt under SSI exemption scheme under central excise.

(c) No CENVAT credit is allowed on inputs/capital goods/input services to a service provider who has opted for threshold exemption scheme (Rs.10 lakhs) in terms of Notification No. 6/05 (as amended by Notification No. 8/08 – ST dated 1.3.2008) .

(d) Similarly, no CENVAT credit is allowed on inputs/input services to a manufacturer who has opted for SSI exemption in terms of Notification No. 8/2003. However, credit on capital goods can be availed in such a case.

(e) CENVAT credit on capital goods is not allowed in respect of that part of value of capital goods which represents the amount of duties/taxes on such capital goods which the manufacturer of final products or service provider claims as depreciation under Section 32 of Income Tax Act, 1961.

(f) In cases where deduction of value of goods sold/used is claimed by the service provider under Notification No. 12/2003, credit of excise duty paid on inputs is not allowed. However, credit of service tax paid on inputs services and excise duty paid on capital goods is allowed.

(g) In cases where, under Notification No. 1/06 – ST dated1.3.06 abatements have been claimed by specified service provider, no input credit of duties on inputs / capital goods or the service tax paid on input services can be availed. It would thus be relevant for a service provider to find out whether opting for the same would be feasible considering the credits which could otherwise be available to him.

A list of services covered under abatement benefit is given in **Annexure 7.1** for ready reference.

(h) In terms of Notification No. 13/08 – ST dated 1.3.08, an unconditional abatement of 75% from the value of taxable services is granted to service provider engaged in transportation of goods by road (GTA) services.

In line of aforesaid, GTA services have been excluded, from the definition of output service under Rule 2(p) of CENVAT Credit Rules, 2004. Hence, GTA service provider cannot avail any benefit of CENVAT credit under CENVAT Credit Rules, 2004.

(i) In regard to service provider registered under works contract service (introduced w.e.f. 1.6.2007), an optional composition scheme has been notified vide Notification No. 32/07 – ST dated 22.5.07 under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

A service provider who has opted for paying service tax under composition scheme at 2% (increased to 4% w.e.f. 1.3.08) can not avail CENVAT credit in respect of the duties paid on inputs. However, he can avail CENVAT credit of duties paid on capital goods / service tax paid on input services.

Another option which a works contractor can examine, is paying the service tax on the gross amount charged without claiming deduction for value of goods and materials sold, which would enable him to avail CENVAT credit of the excise duties incurred on materials or inputs used for such service. This can result in reduction of cost of service especially where most of the materials used for service, have suffered duty of excise at the time of the procurement by such service provider.

7.2 Some judicial rulings

(a) If an assessee files income tax return claiming depreciation on excise portion but later files revised income tax return, the revised return can be considered to examine whether depreciation claimed was in fact availed.

[Terna Shetkari Sangh vs. CCE (2001) 138 ELT 1225 (CEGAT) – followed in Pasari Spinning vs. CCE (2002) 141 ELT 172 (CEGAT)].

(b) Credit availed simultaneously with depreciation for income tax purpose – CENVAT value of goods deducted by income tax authorities for the calculation of taxable income and certified assessment order produced–Held : There was no simultaneous availment of the credit and depreciation. Rule 12 of CENVAT Credit Rules, 2002 – Rule 14 of CENVAT Credit Rules, 2004.

[Shri Vishnu Shankar Mill Ltd. vs. CCE (2007) 5 STR 30 (Tri – Chennai)].

ANNEXURE 7.1

LIST OF ABATEMENTS FROM SERVICE TAX

[Notification No 1/06 dated 1.3.2006 (as amended)]

Sr. No.	Nature of Service	Abatement allowed	Taxable value	Rate of Tax (inc Ed. Cess) after abatement
1	**Mandap Keepers** **a)** Mandap keepers providing catering services; i.e., supply of food	40%	60%	6.18%
	b) Hotels providing mandap keeper services including catering services; i.e., supply of food [See Note 1 below]	40%	60%	6.18%
2	**Tour Operators**: **a)** Package tour [i.e., accommodation cum transport, part of tour]	75%	25%	2.58%
	— Non – package tour [say transport]	60%	40%	4.12%
	— Only accommodation booking forming a part of a tour	90%	10%	1.03%
3	**Rent – a – Cab Scheme Operator**	60%	40%	4.12%
4	**Convention Services** along with catering services [See Note 2 below]	40%	60%	6.18%
5	**Outdoor catering** involving supply of food [See Note 2 below]	50%	50%	5.15%

6	**Pandal and Shamiana Services** including catering services [See Note 2 below]	30%	70%	7.21%
7	**Erection Commissioning or installation** [See Note 3 below]	67%	33%	3.399%
8	**Commercial or Industrial Construction Service** [See Note 4 below]	75%	25%	2.575%
9	**Construction of Complex** [See Note 4 below]	75%	25%	2.575%
10	**Transportation of Goods in Container by Rail**	70%	30%	3.09%
11	**Business Auxiliary Services** in relation to the production or processing of parts or accessories in the manufacture of cycles, cycle rickshaws and hand operated sewing machines, for, or on behalf of the client [See Note 5 below].	30%	70%	7.21%
12	**Services Provided in relation to Chit** as defined under Notification No. 27/08 – ST dated 27.5.08	30%	70%	7.21%

Notes:

(1) The abatements would be available only if:

(a) no input credit in respect of the duties paid on inputs or capital goods or input services has been taken; and

(b) exemption providing for the value of goods and materials sold from the value of taxable service is not availed. [Notification No. 12/2003 – ST dated 20.6.2003].

(2) The bill in case of Sl. Nos. 1,4,5, and 6 should be inclusive of catering charges and the fact should be indicated in the Bill.

(3) The abatement / rebate in case of the erection, commissioning and installation is optional. Further, the abatement is available only if the gross amount charged includes the value of the plant, machinery, equipment, parts and any other material sold by the commissioning and installation agency, during the course of providing the erection, commissioning or installation service.

(4) The abatement in respect of construction services is available only if –

(a) the services are not exclusively of completion and finishing services; and

(b) the "gross amount charged" includes the cost of land and value of goods and materials supplied or provided or used by the provider of the construction service.

(5) Abatement would be available only if the gross amount charged is inclusive of the cost of inputs and input services, whether or not supplied by the client.

CHAPTER VIII

Availment of Credit

8.1 Time limits for availment of CENVAT credit

(a) Inputs

Rule 4(1) of CENVAT Credit Rules, 2004 states that CENVAT credit may be taken immediately on receipt of inputs in the factory of manufacturer of final products or the premises of service provider. Department has clarified that 'immediately' means at the earliest opportunity when the inputs are received. However, this does not mean that if manufacturer of final products / service provider does not take the credit as soon as inputs are received in the factory of manufacturer of final products / premises of service provider, they would be denied the benefit of CENVAT credit. Such an interpretation is not tenable. It is not necessary to take the credit as soon as inputs are received. However, it would be advisable, that manufacturer of final products / service provider avails the credit at the earliest opportunity.

In CCE vs. Mysore Lac & Paint Works Ltd (1991) 52 ELT 590 (CEGAT), it was held that 6 months [time limit for refund is now increased from 6 months to 1 year] is a reasonable time for taking CENVAT credit. [In one case, it was held that in absence of any time limit, CENVAT credit can be taken any time – even after 3 or 4 years. – SAIL vs. CCE (2000) 41 RLT 706 (CEGAT) – followed in Steel Authority of India Ltd vs. CCE (2001) 129 ELT 459 (CEGAT)]. The principle laid down in Formica India Division vs. CCE (1995) 77 ELT 511 (SC) would also be relevant.

Useful reference can also be made to recent judicial rulings viz. J V Strips Ltd vs. CCE (2007) 218 ELT 252 (Tri–Del) where credits taken after a considerable delay was denied to the assessee and Essar Steel vs. CCE (2008) 222 ELT 154 (Tri – Ahd).

The assessee would do well to avail the credit within a reasonable time period. No time has been prescribed under the CENVAT Credit Rules, 2004. Apart from going through the decisions given by the Tribunal and discussed above, it would also be worthwhile to see the circumstances resulting in a delay in availing the credit. Where there is a reasonable cause for such a delay, the credits should be available.

In Coromandal Fertilizer Ltd. v. CCEx. (A) 2009 (239) ELT 99 (Tri–Bang), it has been held that when the law is settled on the issue, there is no justification to deny the credit on the ground that it is availed after 3 to 7 year from the date of receipt of inputs. Further, since the CENVAT Credit Rules do not prescribe any outer limit, Revenue's contention that credit should be availed within reasonable period is not acceptable.

(b) Capital Goods

The CENVAT credit in respect of capital goods received in a factory of manufacturer of final products or in the premises of service provider at any point of time in a given financial year can be taken only for an amount not exceeding fifty percent of the duty paid on such capital goods in the same financial year. [However, CENVAT credit in respect of capital goods shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year if such capital goods are cleared as such in the same financial year].

The balance of CENVAT credit can be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer of final products or in the premises of service provider, if the capital goods [other than components, spares, accessories, refractories and refractory materials, moulds and dies and goods falling under heading 6805, grinding wheels and the like, and parts thereof filling under heading 6804 of the first schedule to the Central Excise Tariff Act] are in the possession of the manufacturer of final products or service provider in such subsequent year.

As a relaxation for SSI units, an amendment has been made w.e.f. 1.4.10, to provide that such units can avail 100% CENVAT credit on capital goods in the same financial year. In

this regard, it has been clarified that SSI unit shall be eligible if aggregate value of clearances of all excisable goods for home consumption in the preceding financial year computed in a prescribed manner, does not exceed 400 lakhs.

Eligibility to be decided on basis of the date of receipt

Issues often arise, more particularly in the case of capital goods, as to what is relevant point of time to determine the entitlement to CENVAT credit.

Some judicial rulings in this regard are given, hereafter, for reference:-

- Eligibility of CENVAT credit on capital goods is required to be decided on the basis of eligibility on the date when goods were received in the factory. Subsequent eligibility does not revive the question of admissibility.

  [CCE v. Surya Roshni Ltd. (2003) 155 ELT 481 (CEGAT) and maintained by the Supreme Court 2003 (158) ELT A273)

- Eligibility of capital goods for CENVAT credit is to be decided as on the date of receipt of capital goods in the factory and not the date of installation.

  [Grasim Industries vs. CCE (2004) 176 ELT 265 (CESTAT) – assessee's appeal dismissed by SC – 179 ELT A 38]

Attention is drawn to a Larger Bench Ruling in the case of Spenta International Ltd vs. CCE (2007) 216 ELT 133 (Tri – LB, WZB) wherein it has been held that the eligibility to credit is to be determined with reference to the dutiability of the final product as on the date of receipt of capital goods.

(c) Input services

According to Rule 4(7) of CENVAT Credit Rules, 2004, CENVAT credit of the service tax paid on input services, can be availed only after manufacturer of final products / service provider makes the payment to the input service supplier of value of input services and the service tax payable on it as shown in the invoice of service provider.

It would appear that mere payment of service tax to service provider is not sufficient for availment of credit. For example, if an invoice is for Rs.100 and service tax is Rs.10.30 [including EC and SHEC] service provider cannot avail CENVAT credit if he pays only Rs.10.30 to the input service. The words used in Rule 4(7) of CENVAT Credit Rules, 2004 are "value of input services and the service tax payable on it'.

In case of associated enterprises, CENVAT credit of service tax can be availed of when the payment to the service provider is made through debit/credit notes and debit/credit entries in books of account or by any other mode as mentioned in explanation (c) to section 67 and service tax is being paid to the Government account.

In CIT vs. Ogale Glass Works 25 ITR 529 (SC), it was held that the payment by cheque, which is subsequently honoured and enchased, relates back to the date of the cheque and in law the date of payment is the date of delivery of the cheque quoted and followed in Vardhaman Chemicals vs. CCE&C (2003) 133 Taxmann 103 (Bom HC DB).

Thus, once a cheque is issued by a service provider to a person who had provided service, CENVAT credit can be taken, even if the cheque gets realized later.

As regards availment of CENVAT credit on input services, the same is linked to the date of payment to input service provider and not to the date of receipt of service. Hence, a reasonable view appears that, as such there is no time limit specified under CENVAT Credit Rules, 2004 for availment of CENVAT credit of the service tax paid on input services received by a manufacturer of final products / service provider.

However, as discussed in para (a) above, it would be advisable to avail credit within a reasonable time from the date of payment to the input service supplier.

8.2 CENVAT credit only of inputs received up to end of month, even if duty / tax is to be paid by 5th/15th of the following month

Excise duty is presently payable on monthly basis. Duty for clearances during the month is payable by 5th of the following month in case of units other than SSI. In case of SSI units, the duty for the whole month is payable by 15th of the following month.

Service tax is payable by 5th of the quarter following the quarter in which payments are received towards the value of taxable services, in case of individual, proprietary firms or partnership firms. In case of other service providers, service tax payable by 5th of the month following the month in which payments are received towards the value of taxable services.

There is one extra day given for the payment (in respect of both excise duty and service tax) where such a payment is made electronically through internet banking and the central government's account is credited.

For the month of March or the quarter ending March, excise duty/service tax is required to be paid by 31st of March.

According to the first proviso under Rule 3(4) of CENVAT Credit Rules, 2004, only CENVAT credit available as on last day of the month/quarter, can be utilized for the payment of the duty even if the duty is payable by 5th/15th of the following month/quarter. The word used is 'available' as on last day of the month/quarter. CENVAT credit becomes available as soon as goods enter the premises or service is paid for. Hence, CENVAT credit of all inputs and 50% of the duty paid on capital goods is 'available' as soon as goods enter the factory of manufacturer of final products/premises of service provider. Thus, CENVAT credit is available in respect of all goods received up to end of the month/quarter and all services paid for, up to end of the month/quarter.

8.3 Reversal of CENVAT credit when final product is subsequently exempted

CENVAT credit is taken as soon as inputs are received in the factory of manufacturer of final products / service provider or input services are paid for. Final product may be cleared later. It may happen that the final product may be subsequently exempt. At that time, some inputs (on which CENVAT has been availed) may be in stock. These inputs will be used for the manufacture of exempted final product. In such cases, one issue arises as to whether CENVAT credit on stocks is required to be reversed. This aspect has witnessed some amount of litigation in the past.

In Ashok Iron & Steel Fabricators vs. CCE (2002) 140 ELT 277 (CEGAT - 5 member bench) and later maintained by the Supreme Court (2003 (156) ELT A212), it was held that if CENVAT credit is availed on inputs and duty on final product is subsequently exempt,

CENVAT credit on inputs lying in stock or inputs contained in final products as on the date of exemption need not be reversed, as there is no provision for reversal of such a credit.

However, in Albert David vs. CCE (2003) 151 ELT 443 (CEGAT) a contrary view has been taken. The same has been affirmed by the Supreme Court in 158 ELT A 273 (SC).

Attention is drawn to a recent Larger Bench Ruling in the case of HMT vs. CCE (2008) 232 ELT 217 (Tri – LB) wherein the following was held with regard to CENVAT Credit Rules, 2002 which existed prior to the introduction of CENVAT Credit Rules, 2004 -

"As regards whether CENVAT Credit Rules, 2002 provide for reversal of the credit on the input taken when final product was dutiable and subsequently became exempt, it was held that, Rule 57-I of Central Excise Rules, 1944 equivalent to Rule 57 AH and Rule 12 of CENVAT Credit Rules, 2002 applicable where credit taken or utilized wrongly – Credit taken or its utilization for the clearance of dutiable final products not objected to by Revenue in impugned case. The Supreme Court has held that the credit legally taken and utilized not is demandable unless a specific provision exist therefore – No one to one correlation in credit scheme – Credit taken and utilized correctly when the final product was dutiable – No requirement to reverse credit on final product becoming exempt subsequently and such a credit not recoverable."

The matter has been settled now with the amendment made to Rule 11 of CENVAT Credit Rules, 2004 with effect from 01.03.2007 whereby a manufacturer of final products/service provider would be required to pay an amount equivalent to the CENVAT credit taken in respect of inputs received for use in the manufacture of the said final product/provision of taxable service which is lying in stock or in process or is contained in the final product lying in stock/taxable service pending to be provided if he opts for exemption from payment of excise duty/service tax. The balance credit remaining after such a payment would lapse.

8.4 Change of classification at the end of manufacturer of final products/service recipient for availment of credit

An important issue that often arises for consideration is, whether classification can be changed at the end of manufacturer of final products / service recipients, for availment of CENVAT credit. In this regard attention is invited to the following rulings:

(a) It is a well settled law that once classification is not challenged

at seller's end, same goods cannot be reclassified at recipient's end so as to deny availment of credit – CCE vs. Hindustan Lever Ltd. (2000) 121 ELT 437 (T) & Tata Oil Mills Co. Ltd. vs. CCE (1997) 91 ELT 144 (T) followed.

[CCE Vs. Courtaulds Packaging (I) Ltd (2007) 217 ELT 399 (Tri – Mumbai)]

(b) In a recent ruling of the Supreme Court, in the case of Sarvesh Refractories Ltd, 218 ELT 488 (SC), it was held that a buyer of capital goods cannot get the excise heading changed to claim CENVAT credit after the manufacturer and the excise authorities classified goods in a different category.

8.5 Implications of default in payments to the Government at the end of supplier

It can often happen that a manufacturer of final products who has availed credit, has made proper payments (including tax/duty) to inputs/capital goods supplier/input service provider but the said supplier/service provider does not deposit the duty/tax with the Government. An issue that arises for consideration is whether Authorities can insist for reversal of CENVAT credit availed.

In this regard attention is drawn to the ruling in Bhuwalka Steel Industries Ltd. v CCE (2007) 212 ELT 63 (Tri – Mumbai) wherein the following was held :

In this case, credit of the duty availed by appellant was sought to be reversed as duty was not paid to the Government by the supplier. It was found that reasonable precautions were taken by the appellant before availing credit; the invoices contained all particulars as prescribed in rules and the credit was taken on bona fide belief of duty payment. The documents showed that excise duty had been paid by the appellant to the supplier. Therefore, CENVAT credit was held to be admissible – [CCE v. Spic Pharmaceutical Division (2006) 199 ELT 686 (T) & Prachi Poly Products Ltd. vs. CCE Raigad (2005) 186 ELT 100 (T) followed].

8.6 Restrictions on availment of CENVAT credit

Refer Chapter VII – Restrictions on Credit Availment.

8.7 CENVAT credit and obligations of manufacturer of dutiable and exempted goods and provider of taxable and exempted services

Refer Chapter XI – Proportionate Credit Mechanism.

8.8 CENVAT credit availment when process does not amount to manufacture - [CBE&C Circular No. 911/1/2010-CX, dated 14.1.2010]

Reference has been received from field formations stating that though certain activities including connectorising, testing, repacking and relabeling of feeder cables, cutting of HR/CR coils into sheets or slitting into strips do not amount to manufacture, such processors are taking CENVAT credit and justifying their CENVAT availment on ground that they are paying duty on final products.

The matter has been examined. As per the provisions of Rule 3 of the CENVAT Credit Rules, 2004, read with Rule 6, credit of duty paid on the inputs is allowed only if these inputs are used in the manufacture of a final product. The Board vide Circular dated 26.9.2007 issued from F. No. 93/1/2005-CX 3, had clarified that if the process does not amount to manufacture, duty is not required to be paid and hence no CENVAT credit of duty paid on inputs is admissible. Attention is also invited to the provisions of section 5B of the Central Excise Act, 1944, where an assessee, who has paid excise duty on a product under the belief that the same is excisable, but subsequently the process of making the said product, is held by the Court as not amounting to manufacture, in such cases, the Central Government may issue an order for non – reversal of such credit in past cases.

In view of above, following instructions are issued :-

(i) In cases where the process undertaken by an assessee indisputably does not amount to manufacture, the department should inform the assessee about the correct legal position and advise him not to pay duty and not to avail credit on inputs.

(ii) If the assessee has already paid duty, and in a situation where there is no manufacture as held by the Courts subsequently, and facts of the case are covered by the provisions of Section 5B of the Central Excise Act, 1944, the assessee is at liberty to approach the Central Government for issue of appropriate notification for regularization of the CENVAT credit availed.

8.9 CBEC Circular No.122/03/2010 ST F. No. 137/71/2009-CX dated 30.04.10 (Relevant Extracts)

"4. Thus the following issues relating to availment of CENVAT credit need clarification,- Whether CENVAT credit can be claimed.

(a) when payments are made through debit/credit notes and debit/credit entries in books of account or by any other mode as mentioned in section 67 Explanation (c) for transactions between associate enterprises; or

(b) where a service receiver does not pay the full invoice value and the service tax indicated thereon due to some reasons.

5. Matter has been examined and clarification in respect of each of the above mentioned issues is as under,-

(a) When the substantive law i.e. section 67 of the Finance Act, 1994 treats such books adjustments etc., as deemed payment, there is no reason for denying such extended meaning to the word 'payment' for availment of credit. As far as the provisions of Rule 4(7) are concerned, it only provides that the CENVAT credit shall be allowed, on or after the date on which payment is made of the value of the input service and of service tax. The form of payment is not indicated in the same and the rule does not place restriction on payment through debit in the books of account. Therefore, if the service charges as well as the service tax have been paid in any prescribed manner which is entitled to be called 'gross amount charged' then credit should be allowed under said rule 4(7). Thus, in the case of "Associate Enterprises", credit of service tax can be availed of when the payment has been made to the service provider in terms of section 67(4)(c) of Finance Act, 1944 and the service tax has been paid to the Government Account.

(b) In the cases where the receiver of service reduces the amount mentioned in the invoice/bill/challan and makes discounted payment, then it should be taken as final payment towards the provision of service. The mere fact that finally settled amount is less than the amount shown in the invoice does not alter the fact that service charges have been paid and thus the service receiver is entitled to take credit provided he has also paid the amount of service tax, (whether proportionately reduced or the original amount) to the service provider. The invoice would in fact stand amended to that extent. The credit taken would be equivalent to the amount that is paid as

service tax. However, in case of subsequent refund or extra payment of service tax, the credit would also be altered accordingly.

8.10 Some judicial rulings

(a) In this case, assessee did not avail CENVAT credit during first financial year in which the capital goods were received – However, assessee availed 100% credit in next financial year – It was held that there is no specific rule which prohibits, in clear terms, availment of more than 50% CENVAT credit even during next financial year – Credit not to be rejected – Rule 4(2) (b) of CENVAT Credit Rules, 2004.

[Keihin FIE Pvt Ltd vs. CCE (2007) 213 ELT 637 (Tri Mumbai)].

(b) Non-use of inputs in manufacture – Inputs procured domestically or imported and credit of the duty paid taken – Imported inputs and spares for the same final products sold as such also – CENVAT credit of CVD sought to be denied on goods not used in manufacture but sold as such – Sale price higher than the value at the time of import – Duty paid at the time of the clearance to be treated as reversal of credit – Entire credit availed on imported inputs to be considered as utilized towards the payment of the duty on sale of such imported goods – It was held that credit reversal is not required – Rules 14 and 15 of CENVAT Credit Rules, 2004.

[Vickers Systems International Ltd vs. CCE (2008) 10 STR 378 (Tri – Mumbai)].

CHAPTER IX

Utilisation of Credit

9.1 Modes of utilisation of CENVAT credit

CENVAT credit availed under CENVAT Credit Rules, 2004 can be utilized for the payment of any excise duty by manufacturer of final products/service tax by service provider as under :

- Payment of duty on any final product manufactured by manufacturer of final products [Rule 3(4)(a)]
- Payment of 'amount' equal to CENVAT credit taken on inputs if inputs are removed as such or after partial processing [Rule 3(4)(b)]
- Payment of 'amount' equal to CENVAT credit taken on capital goods if they are removed as such [Rule 3(4)(c)]
- Payment of appropriate amount of CENVAT credit taken on capital goods if capital goods are removed after use. [Rule 3(5) second proviso]
- Payment of duty on capital goods cleared as waste or scrap [Rule 3(5A)]
- Payment of 'amount', if goods are cleared after repairs under rule 16(2) of Central Excise Rules, 2002 [Rule 3(4)(d)]
- Payment of the service tax on any output service [Rule 3(4) (e)]
- Payment under Rule 6 of CENVAT Credit Rules, 2004 - 5% 'amount' on exempted goods or 6% `amount' on exempted services [Rule 6(3)(i) and (ii)]
- Reversal of CENVAT credit, if assessee opts out of CENVAT [Rule 11(2)]
- Payment of 'amount' if goods sent for job work are not returned within 180 days [Rule 4(5)(a)]
- Reversal of CENVAT credit on inputs whose value is written off in books or capital goods whose value is written off in books before being put to use [Rule 3(5B)]

- Reversal of CENVAT credits on inputs used in the manufacture or production of goods on which duty has been remitted under rule 21 of Central Excise Rules, 2002 [Rule 3(5C)]

9.2 One - to - One correlation not necessary

Rule 3(4)(a) of CENVAT Credit Rules, 2004 states that CENVAT credit may be utilized for the payment of any duty of excise on any final product or any service tax on any output services. Thus, there is no requirement of establishing correlation between inputs/input services and final product / output services.

The Supreme Court, in the case of CCE vs. Dai Ichi Karkaria Ltd (1999) 112 ELT 353 (SC), has laid down an important principle as under :

"There is no correlation of the raw material and the final product, that is to say, it is not as if credit can be taken only on a final product that is manufactured out of a particular raw material to which the credit is related."

The above principle remains very much relevant for CENVAT Credit Rules, 2004 as well.

CBE&C vide para 2(viii) of circular No. 33/33/94-CX, dated 4-5-1994 had also confirmed that there is no 1:1 correlation between the input and the final product under the CENVAT scheme for utilization of credit.

9.3 Restrictions on utilization of credit of education cesses and other specified duties

Education cess, secondary and higher education cess and other specified duties paid on inputs and capital goods can be utilized only for the payment of EC, SHEC and other specified duties on the final product/output service.

However, as per Rule 3(4) of CENVAT Credit Rules, 2004 read with Rule 3(1) of CENVAT Credit Rules, 2004, the credit of basic excise duty, special excise duty, service tax and additional excise duty (GSI) can be utilized for payment of any duty or service tax, as all of these levies together would constitute 'CENVAT credit'. Hence, credit of these duties/taxes can be utilized for the payment of EC, SHEC and other specified duties but vice versa is not permissible.

Further it may be noted that CENVAT credit of any duty specified in sub-rule (1) of Rule 3 cannot be utilized for payment of clean energy cess. W.e.f. 01.07.10, clean energy cess has been levied on coal vide the Finance Act 2010.

9.4 CENVAT credit and obligations of manufacturer of dutiable and exempted goods and provider of taxable and exempted services

Refer Chapter XI – Proportionate Credit Mechanism

9.5 Utilisation of service tax on goods transport agency's services

Departmental clarifications vide CBEC Circular No. 97/8/07 – ST dated 23.8.2007 – Relevant extracts

Para 8.1

(i) Issue – Whether a manufacturer or taxable service provider having credit balance in his account can utilize that credit for the payment of service tax on the goods transport by road, as a consignor or as a consignee?

Comments – In terms of rule 3(4) of the Rules, CENVAT credit can be utilized for the following payments:

(a) any duty of excise payable on any final product;

(b) ……..

(c) ……..

(d) service tax on any output service

In terms of the CENVAT Credit Rules, 2004, 'output service' means any taxable service provided by the provider of taxable service to the service receiver. Further, the definition of 'provider of taxable service' includes a person liable to pay the service tax. Therefore, reading the two definitions in conjunction, it is clear that, to form 'output service', taxable service has to be actually provided by the 'provider of taxable service'. Even if due to a legal fiction, a consignor or a consignee qualifies to fall under the definition of 'a person liable to pay the service tax' (and consequently a 'provider of taxable

service), it cannot be said that he has actually provided any taxable service. The service provided by a goods transport agent (GTA) for which the consignor or the consignee is made liable to pay service tax does not become an 'output service' for such consignor or the consignee. Therefore, the service tax payable by the consignor or consignee on transportation of goods by road cannot be paid through the credit accumulated by such consignor or consignee. For example, a manufacturer of steel sheets procures duty paid steel ingots as inputs and avails CENVAT credit of the excise duty paid on ingots. He clears his finished goods, i.e. steel sheets on payment of excise duty and sends the same to his customer, engaging the service of a goods transport agency. In this case, he pays service tax on service received by him for transportation of the goods. However, the input credit taken on steel ingots cannot be used for the payment of service tax applicable to goods transport agency. The reason is that such manufacturer (consignor) is not the service provider. The transport service is being provided by the 'goods transport agency' and the excise assessee pays the service tax only for the reason that the liability for the payment of service tax has been shifted to the service receiver. Accordingly, the consignor or the consignee has to pay the service tax in cash on the goods transport by road service.

(ii) Prior to 19.4.06, the following Explanation was provided in Rule 2(p) of CENVAT Credit Rules, 2004 which defined "output service":

Explanation - For the removal of doubts it is hereby clarified that if a person liable for paying service tax does not provide any taxable service or does not manufacture final products, the service for which he is liable to pay service tax shall be the output service.

This resulted in an extensive judicial controversy. In the case of CCE vs. Nahar Industrial Enterprises Ltd. (2007) 7 STR 26 (Tri – Del) it was held that payment of the GTA service tax by service recipient is permitted by utilization of CENVAT credit by a manufacturer of final products. This ruling has been followed in many subsequently decided cases. However a contrary view, was expressed by the Ahmedabad Tribunal in CCE vs. Adishiv Forge Pvt. Ltd. (2008) 9 STR 534 (Tri - Ahd) and other cases.

In light of contrary judicial views, in the case of Panchmahal Steel Ltd. Vs. CCE (2008) 12 STR 447 (Tri – Ahd), the matter has now been referred to the Larger Bench for resolution of the controversy.

(iii) With effect from 01.03.2008, the definition of output service has been amended to specifically exclude the goods transport agency's service from the scope of output service. Therefore, neither can the CENVAT credit be taken by the goods transport agency nor can any CENVAT credit be utilized to pay service tax on goods transport by road.

9.6 Removal of inputs/capital goods

(a) When inputs or capital goods on which CENVAT credit has been taken, are removed as such from the factory of manufacturer of final products or premises of service provider, the manufacturer of final products or service provider, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice.

However, such payments are not required to be made where any inputs or capital goods are removed outside the premises of the service provider for providing output service.

(b) With effect from 13.11.2007, it has been provided that, if capital goods on which CENVAT credit has been availed by a manufacturer of final products or service provider are removed after use, such manufacturer of final products or service provider shall pay an amount equal to CENVAT credit taken on said capital goods reduced by 2.5% for each quarter of a year or part thereof from the date of taking the CENVAT credit.

The above amendment was possibly made due to judicial controversy as to whether in cases where capital goods are removed after use, reversal of CENVAT credit is necessary. In this connection attention is drawn to a recent Larger Bench ruling in the case of Modernova Plastyles Pvt. Ltd. vs. CCE (2008) 232 ELT 29 (Tri – LB) wherein the following was held :

- Expression 'as such' in Rule 4(5)(a) of CENVAT Credit Rules, 2004 not having any connection with capital

goods being new, unused or used and covers both capital goods cleared without being put to use and after use – credit availed to be reversed when capital goods removed, whether used or not.

- Legislative intention – Rule 57S(2) of Central Excise Rules, 1944 contained expressions 'without being used' and 'after being used' – Such clauses merged by using expression 'as such' indicating the intention to cover both capital goods cleared without use and cleared after being used.

- *Expression "as such" is to be interpreted as commonly understood which is in the 'original form' and 'without any addition, alteration or modification'.*

(c) An amendment has been made w.e.f. 27.2.10, specifying a higher rate of depreciation in case of removal of computers & computer peripherals, as under :

Each quarter in a year	Rate of deduction
First	10
Second	8
Third	5
Fourth & Fifth	1

For other capital goods, rate of 2.5% would continue.

9.7 Capital goods cleared as waste and scrap

With effect from 16.5.2005, it has been specifically provided under Rule 3(5A) of CENVAT Credit Rules, 2004 that if capital goods are cleared as waste and scrap, the manufacturer of final products shall pay an amount equal to the duty leviable on transaction value of such capital goods.

It is pertinent to note the above provision does not apply to a service provider.

9.8 Inputs/Capital Goods written off

(a) Inputs/Capital Goods

According to Rule 3 (5B) of CENVAT Credit Rules, 2004 - If the value of any,

(i) **i**nput, or

(ii) capital goods before being put to use,

on which CENVAT credit has been taken is written off fully or where any provision to write off fully has been made in the books of account, then the manufacturer of final products shall pay an amount equivalent to the CENVAT credit taken in respect of such inputs/capital goods.

However, if such inputs / capital goods are subsequently used in the manufacture of final product, manufacturer of final product shall be entitled to take credit of the amount equivalent to CENVAT credit paid earlier.

Rule 3 (5B), has been amended w.e.f. 7.7.09, whereby the above provisions are now applicable to service providers as well.

(b) CENVAT credit reversal on inputs in work in progress written off in accounts - [CBEC Circular No. 907/27/2009 – CX. dated 7.12.2009]

1. References have been received from field formations stating that as per Rule 3(5B) of CENVAT Credit Rules, 2004, if the value of inputs is fully written off, then the manufacture is required to pay an amount equal to CENVAT credit taken. However, there is no provision to demand reversal of credit taken on inputs which have gone into manufacture of work in progress (WIP), semi finished goods and finished goods which have also been written off fully in the books of accounts.

2. The matter has been examined. Rule 3(5B) of the CENVAT Credit Rules, 2004, provides that if the value of any input on which CENVAT credit has been taken is written off fully in the books of accounts, then the manufacturer is required to reverse the credit taken on the said inputs. As far as finished goods are concerned,

it is stated that excise duty is chargeable on the activity of manufacture or production. Even though liability for payment of tax has been postponed to the time of removal of goods for the factory, but still the legal liability to pay the excise duty has been fastened on the goods, when it has been manufactured or produced. Therefore, normally all goods manufactured suffer excise duty at the time of removal, but if the manufactured goods are destroyed due to natural causes etc., Rule 21 of Central Excise Rules, 2002, provides for remission of duty. Further, Rule 3(5C) of CENVAT Credit Rules, 2004, also requires reversal of credit on the inputs when the duty is ordered to be remitted under the said Rule 21. Therefore, if the goods have been manufactured, in that case, a manufacturer is liable to pay excise duty unless duty is remitted under Rule 21. Therefore, if the value of finished goods is written off, the manufacturer would be liable to pay excise duty or he would be required to reverse the credit on the inputs used, if duty has been remitted on finished gods.

3. As regard writing off work in progress (WIP), it is stated that if the WIP has reached the stage, when it can be considered as manufactured goods, in that case, the same treatment as applicable to finished goods, discussed in para 2 above would apply. However, if the activity carried out on the WIP goods cannot be considered as amounting to manufacture, in that case, the said goods should be considered as input and the treatment for reversal of credit applicable to input would be applicable.

9.9 Remission

According to Rule 3(5C) of CENVAT Credit Rules, 2004, where on any goods manufactured or produced by an assessee, the payment of duty is ordered to be remitted under rule 21 of Central Excise Rules, 2002, the CENVAT credit taken on the inputs used in the manufacturer or production of said goods is required to be reversed.

9.10 Unutilised CENVAT credit

The Supreme Court, has laid down a very important principle in CCE vs. Dai Ichi Karkaria Ltd. (1999) 112 ELT 353, that MODVAT credit properly availed is indefeasible. The same can be carried forward for an indefinite period of time. The above principle is very much relevant for CENVAT Credit Rules, 2004 as well.

However, Chapters X and XIV may be referred to, which discuss specific provisions for refund of CENVAT credit and transfer of CENVAT credit, respectively.

9.11 Some judicial rulings

(a) In the said case the appellants had paid their output tax for the months comprised in the period from May, 2003 to November, 2003 of Rs.8.63 lakhs entirely in cash without utilising any input credit. However, they had an accumulated input credit balance of Rs.7.61 lakhs out of which they could have utilized 35% for the output tax; i.e. Rs.3.02 lakhs, for payment of their service tax liability under Rule 3(5) but which they did not utilize. Subsequently, for the months comprising from December, 2003 to March, 2004 they discharged the service tax liability of Rs.5.50 lakhs by utilising CENVAT credit to the extent of Rs.4.94 lakhs and paying the balance of Rs.0.56 lakhs in cash on the basis that Rs.4.94 lakhs is 35% of the aggregate output tax liability for the period May, 2003 to May, 2004; i.e. Rs.14.13 lakhs though for the period December 2003 to March 2004 their utilization of Rs.4.94 lakhs was more than 35% of the output tax. The service tax department objected to the utilization of Rs. 4.94 lakhs of CENVAT credit since it was more than 35% of the output tax liability for that period. However, the Tribunal dismissed the department's contention and held that at any point of time, the service provider can arrive at his liability which is service tax payable on his output service. He should calculate 35% of his liability under rule 3(5) from out of the accumulated credit which he is allowed to utilize up to 35%. There is no indication that the service tax credit accumulated during the earlier period would lapse. In other words, there is no question of the lapse of the credit legally taken. Thus, since the total credit utilization from May 2003 to March 2004 was

Rs.4.94 lakhs which was 35% of the output tax liability for that period; i.e. Rs.14.13 lakhs there was no excess utilization.

[Vijayanand Roadlines Ltd. vs. CCE (2007) 7 STR 219 (CESTAT – Bang.)]

(b) CENVAT/MODVAT account is indefeasible – Fragment to restrict earned credit only to particular lines of production is not permissible – Such an allocation of credit, raw material-wise or final product - wise is not permitted by the Rule nor it is practicable – Rule 3 of CENVAT Credit Rules, 2004

[Vardhman Spg. & Gen. Mills vs. CCE (2008) 10 STR 109 (Tri – Del).]

Payment of education cesses (EC) out of input credit of basic excise duty (BED) – Rule 3(7)(b) of CENVAT Credit Rules, 2004 placing limitation for the utilization of the credit obtained through EC paid on inputs has no application in regard to utilization of credit of BED – Rule 3(4) of CENVAT Credit Rules, 2004 which relates to BED places no limitation on utilization of such duty credit – Payment of EC from BED credit permissible. It was also held that education cess was also a duty of excise.

[Sun Pharmaceutical Industries vs. CCE (2008) 11 STR 93 (Tri – Del)].

CHAPTER X

Refunds

10.1 Cash refund to exporters if CENVAT cannot be utilized by exporters

10.1.1 Provisions under CENVAT Credit Rules, 2004

As per Rule 5 of CENVAT Credit Rules, 2004, where any input or input service is -

- used in the manufacture of the final product which is cleared for export under bond or letter of undertaking, (as the case may be), or
- used in the intermediate product cleared for export, or
- used in providing output service which is exported,

The CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service for –

- payment of duty of excise on any final product cleared for home consumption or for export on payment of duty or
- for payment of service tax on output service.

Where for any reason such adjustment is not possible, the manufacturer of final products or service provider would be granted a refund of unutilized credit. The refund would be subject to the conditions and safeguards notified in this regard.

However, refund is not admissible in the following cases:

- where the exporter has availed duty drawback or has claimed a rebate of the duty in respect of such duties or
- where the exporter has claimed a rebate of service tax under Export of Services Rules, 2005 and Notifications issued thereunder.

10.1.2 Procedure to be followed

Procedure for claiming refund of service tax paid on input services and excise duty paid on inputs has been specified under Notification No. 5/06 – CE(NT) dated 14.3.06.

As per the procedure prescribed, Application is required to be submitted in Form 'A' to the Assistant Commissioner/Deputy Commissioner. Application can be submitted every quarter. However, in following cases, refund can be claimed on a monthly basis:

- Persons whose average export clearances are more than 50% of total clearances
- Refund is being claimed by EOU

Format of application (viz Form A) can be downloaded from www.cbec.gov.in

10.1.3 Eligibility of exporters of goods and exporters of taxable services

As stated earlier, the procedure for refund under CENVAT Credit Rules, 2004 is available even to service provider. However, he can avail the procedure only in cases where his output service is a 'taxable service'. As per rule 2(p) of CENVAT Credit Rules, 2004, 'output service' means a taxable service excluding goods transport agency's service provided by a service provider. Thus, if the output service is not 'taxable', Rule 5 of CENVAT Credit Rules, 2004 would not be applicable to the service provider.

In case of a manufacturer of a final product, the benefit of refund should be available even if the goods exported happen to be nil rated. This is because Rule 5 requires the inputs or input services to be used in the manufacture of final products. Rule 2(h) of CENVAT Credit Rules, 2004, which defines "final products", goes thus – "final products" means excisable goods manufactured or produced from the input or using input service.

The term "excisable goods" has been defined under Section 2(d) of Central Excise Act, 1944 to mean – goods specified in the First Schedule and the Second Schedule to the Central

Excise Tariff Act 1985 as being subject to a duty of excise. Thus, we can have a scenario where goods may find a mention in the Excise Tariff but may carry nil rate of duty. The same should apply even to the goods which find a mention in Tariff but are exempted from the duty of excise by an exemption notification. It is also worthwhile to note that Rule 6(6)(v) of CENVAT Credit Rules, 2004 also makes an exception in application of the said Rule (restricting credits on exempted goods) on clearances for export under bond.

Some judicial rulings are given hereafter:

(a) 100% EOU is entitled to take CENVAT credit of the duty paid on inputs procured indigenously and when they are not in a position to utilize the same, they are entitled for benefit of refund under Rule 5 of CENVAT Credit Rules, 2004.

[ANZ International vs Commissioner of Customs (2008) (224) ELT 573 (Tri-Bang) which has also been approved by Karnataka High Court (2009) (233) ELT 40 (Kar)].

(b) Manufacturer entitled to credit on the inputs used in export goods, whether dutiable or exempted and refund was held to be allowable.

[Punjab Stainless Steel Industries vs CCE Delhi (2008) (226) ELT 587 (Tri-Del)].

(c) Refund of input duty credit on exported goods - Letter of undertaking (LOU) accepted in lieu of bond for export even though finished goods were exempted - Refund of CENVAT credit on inputs and packing materials allowed, liberally interpreting provisions of Rule 6(5) of CENVAT Credit Rules, 2002 - Rule 5 of CENVAT Credit Rules, 2004

[Jobelle vs. CCE Mumbai (2006) (04) STR 365 (Tri-Mum)].

10.1.4 Quantum of CENVAT credit available as refund

Refund of the input service credit will be restricted to the extent of ratio of export turnover to the total turnover for the given period e.g. if total credit of input services is Rs.100, total

turnover is Rs.500 and export turnover is Rs.250, refund of input service tax credit will be only Rs.50 (i.e. 50%, since export turnover is 50% of total turnover).

Export turnover = Value of final products exported + Value of output services exported.

Total turnover = Value of output service and exempted service provided + Value of excisable and non excisable goods cleared + Value of bought out goods sold.

Total turnover would include value of exports as well.

This restriction applies only to the credit of the service tax paid on input services and not in respect of refund of excise duty.

10.1.5 When cash refund is not admissible

Cash refund of CENVAT credit is not admissible in the following cases:

- Supply is to EOU units, EHTP or STP
- Exports are to Nepal or Bhutan
- If exporter claims rebate of duty/service tax
- Duty drawback of excise portion has been claimed

10.1.6 Refund permissible even if drawback of customs portion availed

The manufacturer of final products is not entitled to the drawback of excise duty portion, if the refund is granted as per provision of Rule 5 of CENVAT Credit Rules, 2004. The duty drawback rates for export products are indicated with their customs and central excise allocation. The customs portion covers basic customs duty, surcharge on customs duty and special additional duty; while excise duty portion covers central excise duty and counterveiling duty. Thus, if the exporter avails duty drawback in respect of only the customs duty portion, he will be entitled to refund of CENVAT credit of duty paid on inputs. Reference can be made to Circular No.83/2000-Cus dated 16.10.2000.

10.1.7 Some judicial rulings in regard to manufacturer of final products

(a) If a manufacturer establishes that he is not in a position to utilize credit of duty paid on the inputs used in exported goods during particular quarters he is entitled for refund.

[CCE vs. Gupta Soaps (1999) 111 ELT 720 (CEGAT) Refer CCE v. Sterlite Industries India Ltd (2006) 3 STT 282 (CESTAT)].

(b) Department has no jurisdiction to find out why adjustment of CENVAT credit for other purpose is not possible. Refund claim cannot be denied on the ground that the credit can be utilized for future clearances.

[Navbharat Industries vs. CCE (2006) 199 ELT 148 CESTAT)].

(c) Even if a merchant exporter avails duty drawback of customs portion, the supporting manufacturer can claim refund of CENVAT credit (since it covers only excise portion).

[CCE vs. Meghdoot Pistons (2006) 201 ELT 398 (CESTAT)].

(d) In cases where CENVAT/MODVAT in regard to exports remain unutilized despite home consumption – Rule 5 of CENVAT Credit Rules, 2002 being a beneficiary piece of legislation, refund on account of the same cannot be denied – Refund of unutilized credit being a substantive right, Central Excise Officers have no jurisdiction to curtail it and find reason for non-adjustment – Credit being not utilized or adjusted, assessee liable to refund of same.

[Idol Textiles Ltd. vs. CCE (2007) 217 ELT 299 (Tri – Mumbai)]

(e) Refund of unutilized credit claimed on the inputs used in export goods and the evidence produced indicating the amount of credit lying in balance not utilized and filing of refund claim on quarterly basis – Substantial compliance of the procedure under Notification No.11/2002-C.E.

(N.T.) established – Impugned goods exported through merchant exporter, not disputed – Order of Commissioner (Appeals) allowing refund sustained.

[CCE vs. Sipra Engineers Pvt. Ltd. (2007) 217 ELT 239 (Tri – Mumbai)].

(f) Rule 5 of CENVAT Credit Rules, 2004 applies to actual exports and not deemed exports like supplies to EOU etc.

[SV Business Ltd. vs. CCE (2006) 198 ELT 408 (CESTAT)]

(g) If the final product is exported under DEPB and when duty drawback on inputs is not availed, the assessee is entitled to refund of accumulated CENVAT credit.

[Ispat Industries Ltd. vs. CCE (2006) 195 ELT 37 (CEGAT).]

(h) Manufacturer supplied goods under CT-2 to another manufacturer, for ultimate export by the said another manufacturer after use of the goods in his factory. The said supplier — manufacturer was unable to utilize accumulated CENVAT credit for other products and filed a refund claim. It was held that refund of CENVAT credit (of inputs used in manufacture of goods which were supplied under CT-2 certificate) is admissible.

Rule 5 of CENVAT Credit Rules, 2004 does not suggest that goods must be directly cleared from the factory for export. Even if inputs are used in manufacture of intermediate products and the final product is ultimately cleared for export, refund of CENVAT credit is admissible.

[S V Business P Ltd. vs. CCE (2006) 198 ELT 408 (CESTAT) Refer – CCE vs. Gupta Soaps (1999) 111 ELT 720 (CEGAT); and CCE vs. Gavs Laboratories Pvt. Ltd. (1997) 92 ELT 696 (CEGAT)]

(i) Full duty paid on inputs has to be refunded, irrespective of amount of duty payable on final products (which may be even lower than duty paid on inputs).

[CCE vs. Weston Electronics Ltd. (1997) 93 ELT 189 (CEGAT)]

(j) Refund in cash of the debit made in MODVAT account eligible if reversal made at insistence of Department – Credit can be given in MODVAT account but if not able to utilize then cash refund to be made

[Gauri Plasticulture (P) Ltd. vs. CCE (2006) 202 ELT 199 (Tri – Mumbai)]

(k) Whether basic concept of CENVAT credit scheme is that even if services are not used in or in relation to manufacture of final product, but are in relation to business aspects of manufacture, credit of service tax paid on all business related expenditures it to be allowed – Held, yes – Appellant was a 100 per cent Export Oriented Unit – It manufactured excisable goods, viz., electrical wiring, accessories, etc. – Its entire products were exported out of India – Revenue sought to reject refund of service tax paid on services received by appellant which were (i) rent-a-cab service, (ii) outdoor catering service, (iii) air travel booking, (iv) telephone/mobile service, and (v) steamer agents service, on ground that these services were not input service as they were not in relation to manufacture of final products – Whether since all these services used by appellant were in relation to its business activities, even if not directly in relation to manufacture of final product, refund claim of service tax on them could not be denied – Held, Yes.

[Semco Electrical (P) Ltd v CCE (2010) 24 STT 508 (Mum – CESTAT)]

10.1.8 Some judicial rulings in regard to service provider

(a) Refund of CENVAT credit in regard to Export of Services – Interpretation of CENVAT Credit Rules, 2004, Pre-substituted Rule 5 – Refund of unutilized service tax credit not allowed to the provider of output services – Neither any conditions, safeguards and limitations provided in respect of the provider of output services during relevant period nor any procedure was prescribed for claiming refund of unutilized CENVAT credit availed on input services used in export of output services –

Alleged omission cannot be considered as an obvious mistake in printing/drafting, nor can the amended provisions be considered to be clarificatory in nature and cannot, therefore, have a retrospective effect. However, where refund claims were filed after the amendment and satisfied every requirement of Rule 5 and the notification issued there under, the refunds cannot be rejected merely because they relate to the exports made prior to the date of amendment.

[WNS Global Service (P) Ltd. vs. CCE (2008)10 STR 273 (Tri – Mumbai)].

10.1.9 Refunds under special circumstances

(a) Registration surrendered and utilization from CENVAT account not possible – Cash refund ordered by lower appellate authority – Payment originally made in cash – Respondent not an assessee who can operate CENVAT account. Revenue appeal rejected.

[CCE v. Nag Polypouches (P) Ltd. (2007) 8 STR 223 (Tri. Del.)].

(b) Unutilised credit – Assessee stopped production due to closure of factory and came out of CENVAT scheme – Rule 5 of CENVAT Credit Rules, 2002 does not expressly prohibit refund of unutilized credit where there was no manufacture in the light of closure of factory – Moreover, since assessee has come out of CENVAT Scheme, refund of unutilized credit has to be made.

[UOI vs. Slovak India Trading Co. Pvt. Ltd. (2008) 10 STR 101 (KAR)]. This was also maintained by the Supreme Court in UOI v. Salovak India Trading Pvt. Ltd. [2008 (223) ELT A170 (SC)].

10.2 Refund in regard to Export of Services Rules, 2005 (ESR)

(a) Under Rule 5 of Export of Service Rules 2005, the Central Government is empowered to grant –

- Rebate of service tax paid on such taxable service exported or
- Rebate of service tax or duty paid on input services or inputs used in providing such taxable service exported.

The rebate would be subject to conditions prescribed. The Central Government has come out with two notifications regarding rebate and these are – Notification No. 11/2005 ST dated 19.04.2005 and Notification No.12/2005 ST dated 19.04.2005 respectively.

It may be noted that between the two, Notification No.12/2005 ST is more stringent in requirement as the details of usage of the inputs or input services for providing the taxable service to be exported is to be furnished before the sanctioning authority.

Notification 11/2005 ST provides an option to the service provider of utilizing his credits for paying the service tax (debit entry against the credits) on export of taxable services and then claiming the rebate of the amount debited/paid. Needless to say, the service tax being debited should ideally not be collected from the customer/client. The export bill should contain proper disclosures about the taxable service being exported under a claim for rebate.

The text of the Notification may be referred to for procedures and conditions to be complied. Format of application (viz. Forms ASTR 1/ASTR 2) can be downloaded from www.cbec.gov.in

(b) Some judicial rulings

(i) Denial of rebate on the ground of delay in filing relevant declaration, services not falling under input service, services used in maintenance or repair of capital assets and services having no direct nexus with output service – Customer care services rendered on behalf of foreign clients through telephone and e-mail – Imported Management Consultant service used in relation to providing export services and cost of such imported services forming part of value of export services – Cost of services used in procuring services from foreign country included in cost of imported input services – Late filing of declaration only a procedural lapse and substantial concession not deniable – Liberal view to be taken in case of export – Eligibility to credit not under dispute – Refund of credit provided in similar situation and hence, rebate admissible – Rule 5 of Export of Services Rules, 2005.

Services used in connection with setting up premises and services used in connection with repairs of premises considered as input services – Services used for in – between activity namely day to day maintenance also to be considered as part of input service – Rule 2(l) of CENVAT Credit Rules, 2004.

Input services used in connection with procurement of other input services to be treated as input services – Rule 2(l) of CENVAT Credit Rules, 2004.

Eligibility to credit of duty paid on inputs and tax paid on input services not contingent on whether services are exported or not – Criteria for credit eligibility same whether entire services exported or same services provided to domestic customers in full or in part – Rules 2(k) and 2(l) of CENVAT Credit Rules, 2004.

[CCE v Convergys India Pvt. Ltd. (2009) 16 STR 198 (Tri – Del)].

(ii) Call centre services, back office accounting and IT support services provided to parent company outside India and its customers abroad – Services rendered not covered under Information Technology service and excluded from Business Auxiliary Services as per C.B.E. & C. clarification dated 21.8.2003 – Service rendered and exported held as taxable services by Commissioner (Appeals) – Input services used – Rebate equal to service tax paid entitled once taxable service exported and input services utilized for providing output service – Input service to be interpreted liberally in view of phrase "activities relating to business" – Input services relating to output services exported – Conditions in Notification No. 12/2005 –ST satisfied – Rebate admissible.

[Dell International Services India P. Ltd. v. CCE (2010) 17 STR 540 (Tri. – Bang)].

(iii) Refund of credit – CENVAT credit of service tax – Refund admissible only on services consumer for

providing output service – Appellant – EOUs exporting services – Credit admissibility not examined when credit was taken – Credit allowed on certain services while rejected on some other in present case – Appellant themselves coming out with negative list of services stating credit as not admissible – Department to verify admissibility of credit before granting refund and to ensure whether eligible services have actually gone into consumption for providing exported output service and not utilized for other purpose – Impugned orders set aside – Matter remanded to original authority to decide afresh – Refund amounts sanctioned by original authority and not appealed against, not to be disturbed – Procedure prescribed under C.B.E. & C. Circular No.120/1/2010-ST., dated 19.1.2010 to be followed.

Refund of credit – CENVAT credit of service tax – Section 94 of Finance Act, 1994 not containing power to make rules for refund of CENVAT credit – Form and manner for filing application for refund mentioned in section 37 of Central Excise Act, 1944 – Rules 5 of CENVAT Credit Rules, 2004 providing for refund of unutilized credit of service tax in respect of input service – Services consumed for providing taxable service mentioned in Finance Act, 1994 while expressions used in CENVAT Credit Rules, 2004 and Notification No.5/2006 – C.E. (N.T.) different – Rule making authority can frame rules covering lesser area than empowered but cannot go beyond limits provided under statute.

Refund of CENVAT credit of service tax – Input service C.B.E.&C. Circular No.120/1/2010-ST., dated 19.1.2010 stating that certain specified services to be considered as input services – No such hard and fast rule can be made – Circular ibid does not have effect of amending statute – Circular not to be seen as authorizing refund if credit of service tax not relate to services consumed for providing output services – Officials sanctioning refund

to necessarily examine if credit relates to services consumed for providing output service in view of statutory provisions – Circular not binding on adjudicating and appellate authorities.

CENVAT credit of service tax – Input service – Supreme Court in case of Maruti Suzuki [(2010) 240 ELT 641 (SC)] while considering CENVAT credit on inputs referred to integral connection with ultimate production; dependence test and functional utility test – Input service on which CENVAT credit is claimed required to meet tests specified though rendered in context of goods rather than services – Process undertaken to produce exported output service also to be examined to determine what input services consumed in the process.

[Kbace Tech Pvt Ltd v CCE (2010) 18 STR 281 (Tri-Bang)].

(c) Recent Amendments

Amendment to Notification No. 5/2006-CE(NT) issued under Rule 5 of the CENVAT Credit Rules, 2004 – Extracts from Dept Clarification No. 334/1/2010 – TRU dt. 26.2.10

Para 8.1

It may be recalled that a number of representations were received from exporters, especially the exporters of services regarding difficulties being faced in availing the benefit of refund of accumulated credit under the scheme prescribed under Notification No. 5/2006-CE (NT) dated 14.03.2006, issued under rule 5 of the CENVAT Credit Rules, 2004. While certain issues germinated from the wordings used in the provisions of the notification or interpretation of such provisions, other issues were more in the nature of administrative difficulties in operating the scheme. As an immediate measure, CBEC issued a clarificatory Circular No. 120/01/2010-ST, dated 19.01.2010. It was, however, felt that a permanent solution would require supplementing the

clarification with certain amendments to the notification, part of which had to be 'retrospective' in nature.

Accordingly, Notification No. 5/2006(CE) (NT) has been amended vide Notification No. 7/2010-CE (NT), dated 27th February 2010. This mainly deals with the procedure that needs to be adopted in case of the new refund claims. However, to resolve the disputes arising on account of the wordings/illustration provided in the notification, the same is being amended retrospectively (w.e.f. 14.03.2006) (Clause 73 of the Finance Bill, 2010 refers) so as to resolve the disputes in respect of pending cases as well. Therefore to visualize the entire revamped and simplified refund scheme, both the amending notification and the Finance Bill provision must be read in conjunction. A note on the issue is given hereafter as **Annexure 10.1**.

Continued…

ANNEXURE 10.1

Refund of accumulated CENVAT credit to exporters: Amendments in Notification No. 5/2006-CE (NT)

Representations had been received by the Board that refund of accumulated CENVAT credit to the exporters of services and other service providers like call centers and BPO's were getting delayed and most of them are ultimately getting rejected,-

(i) On account of difference in perception/interpretation between the department and the export of services as to whether their activities fall under the purview of 'export of service at all';

(ii) Difference in wordings used in Notification No. 5/2006-CE (NT) dated 14.03.2006, issued under Rule 5 of CENVAT Credit Rules, 2004 as regards the definitions of terms such as 'inputs'/ 'input services'

(iii) The procedural requirements prescribed under the notification and illustrations given therein were causing difficulties both in terms of delays and filing of incorrect/incomplete refund forms.

The issue was discussed both with the departmental officers as well as the trade and as an immediate solution, Circular No.120/01/2010-ST dated 19th January, 2010 was issued.

To give legal backing to the above said circular, leading to faster and fair settlement of the refunds claims, changes have been effected in Notification No. 5/2006-CE (NT). Some of the changes have been made retrospective so that the pending cases are also covered. Other changes are being brought in prospectively, and are aimed at assisting the departmental officers in faster processing of refund claims. The retrospective amendments are contained in clause 73 of the Finance Bill, 2010 while the prospective changes are contained in Notification no.7/2010-Central Excise (Non Tariff) dated the 27th February, 2010. Both these documents may be carefully read together for appreciating the full impact of the changes. The salient features of these changes are as follows:-

Retrospective changes effected from 14.03.2006 (i.e. from the date of issue of notification)

(1) The words "in relation to" have been added in main condition (a) of the Notification.

(2) The word "in' contained in main condition (b) of the said Notification has been replaced with "for".

The above two changes ensure that the provisions of the refund notification and the CENVAT Credit Rules are aligned and that refund is granted on all goods or services on which CENVAT can be claimed by the exporter of goods or services.

(3) The illustration given in condition 5 of the Appendix to the Notification has been deleted. This ensures that refund of CENVAT credit which has been availed in the period prior to the quarter/ period for which the refund has been claimed is also eligible for refund. The refund claims should be calculated only on the basis of the ratio of the export turnover to the total turnover of the claimant. Thus, if the CENVAT credit available to the exporter at the end of the quarter, or month, as the case may be, is Rs. 1 crore, and the ratio of export to total turnover during the quarter is 50%, then Rs. 50 lakh should be refunded to the exporter.

The essence of the changes is that refund shall be available for all goods, or input services, on which CENVAT is permissible and should be processed accordingly.

Further, refund of CENVAT should not be linked to CENVAT taken in a particular period only.

Prospective changes

1. The conditions A and B given in the Annexure to the Notification are being deleted, and the details required to be given under these conditions, along with certain additional details, are to be furnished by the claimant in a table, which has been prescribed in condition A. The table should be certified by a person authorized by the Board of Directors (in the case of a limited company) or the proprietor/partner (in case of firms/partnerships) if the amount of refund claimed is less than Rs.5 lakh in a quarter. In case the refund claim is in excess of Rs.5 lakh, the declaration should also be certified by the Chartered Accountant who audits the annual accounts of the exporter for the purposes of Companies Act, 1956 (1 of 1956) or the Income Tax Act, 1961 (43 of 1961), as the case may be. This verification is aimed at reducing the checking of voluminous records which is required to be

done by the officers processing the refund claims and ensure faster processing of refund claims.

2. Consequential changes by introducing the words “in relation to” and “for” in the Annexure to the Notification have been brought to bring them in line with the amendments made in the main conditions of the Notification.

CHAPTER XI

Proportionate Credit Mechanism

11.1 Proportionate Credit

Rule 6 (1) of CENVAT Credit Rules, 2004 provides that CENVAT credit shall not be allowed on the inputs or input services which are used for the manufacture of exempted goods or for providing exempted services except in the circumstances mentioned in Rule 6 (2) of CENVAT Credit Rules, 2004. The said sub - rule provides that where inputs / input services are used for providing taxable as well as exempted services and the manufacture of excisable as well as exempted final products then –

- The manufacturer or service provider would have to maintain separate accounts for receipt, consumption and inventory of input and input services meant for use in the manufacture of dutiable final products and providing output service and those meant for use in the manufacture of exempted goods and for providing exempted services **and**
- Take CENVAT credit only on that quantity of inputs or input service intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.

The maintenance of separate records as aforesaid is optional at the hands of the manufacturer of final products/service provider. Where such records are not so maintained and such manufacturer of final products or service provider seeks to claim the whole CENVAT credit on all inputs or input services or capital goods received, the below mentioned paragraph would be relevant.

Upto 31.3.08, Rule 6(3)(c) of CENVAT Credit Rules, 2004 provided that where a service provider opted not to maintain separate accounts as per rule 6(2) of CENVAT Credit Rules, 2004 for determining the inputs/input services used for providing taxable output services, he was to utilize the credit only to the extent of an amount not exceeding 20% of the amount of the service tax payable on taxable output service. Here readers may note the word “utilize” as the assessee could avail the entire CENVAT amount but utilize only to the extent of

20% of the service tax payable on output service. The balance amount left unutilized could be carried forward to the subsequent month/quarter/ year.

A manufacturer opting not to maintain separate records as aforesaid was required to pay an amount of 10% of the total price charged for the sale of exempted goods at the time of their clearance from the factory excluding sales tax and other taxes paid. This could be paid by utilizing the CENVAT credit balance on hand.

11.2 Provisions inequitable

It was extensively represented by trade as well as Professional Bodies that the provisions of Rule 6(3) (c) of CENVAT Credit Rules, 2004 are not equitable inasmuch as it does not distinguish between a service provider who has a low percentage of taxable turnover (say only 2%) as against another service provider who has a higher percentage of taxable turnover (say 98%) and ideally the availability of input credit should be a proportion of taxable turnover to total turnover and related to the amount of tax paid on the input service and not on the tax payable on output service.

The above rule resulted in the following:

- Accumulation of huge balances of unutilised CENVAT credit in the hands of service provider.
- Manufacturers of final products availing small amounts of CENVAT credit in regard to common input services (like telephone etc.) were exposed to disproportionately large demands calculated at 5% (upto 6th July, 2009 10%) of the value of exempted goods.

The aspect of proportionate credit has been a subject matter of extensive judicial consideration under central excise.

In case of CCE vs. Philips India Ltd. (2006) 200 ELT 106 (Tri – Mumbai) the company was asked to pay an amount of Rs.1,09,21,592 against an inadmissible credit amount of Rs.87,569 in respect of the inputs used in exempted final products. The company, as the manufacturer of dutiable and exempted goods, had availed credit on common inputs. Since segregation of the use of inputs was not possible, the manufacturer reversed proportionate credit on inputs used for exempted goods before clearance of exempted goods from

the factory. The reasonableness of formula for reversing the credit was accepted by the Department. Ratio of Supreme Court Judgement in Chandrapur Magnets case [81 ELT 3(SC)] was held applicable and reversal before clearance of exempted goods was held as amounting to non – availment of credit. There are other rulings on similar lines under central excise.

In an important recent ruling of Larger Bench in Nicholas Piramal (I) Ltd vs. CCE (2008) 232 ELT 37 (Tri – LB), while considering the issue of common inputs used in dutiable and exempted goods, the following was observed :

"As regards issue as to whether payment of amount of 8% under Rule 6 of CENVAT Credit Rules, 2002 is required when amount equivalent to credit attributable to inputs used in exempted goods paid before the removal of exempted goods, Supreme Court in 1996 (81) ELT 3 (S.C.) held that reversal of duty amount before removal of exempted goods amounting to non-availment of credit on inputs – Law is settled that reversal of the credit taken on inputs is as goods as non-availment of credit on inputs as per Supreme Court and High Court decisions – Hence, payment of 8% or 10% not required when the credit on the inputs used in exempted goods paid."

The above stated Large Bench ruling was reversed by the Bombay High Court in CCE v. Nicholas Piramal (India) Ltd. (2009) 244 ELT 321 (Bom). In this case the assessee was a manufacturer of vitamin A (dutiable product) and animal feed supplement (exempt product). They first used the inputs in the manufacture of crude vitamin A which is an intermediate product. Crude vitamin A is further used in the manufacture of vitamin A and animal feed supplement. Before clearing the exempt product they reversed the duty on inputs to the extent used in the manufacture of exempt product. The department contended that the assessee is liable to pay 8%/10% of the value of exempt product and a mere reversal would not suffice. The Large Bench of the Tribunal held in favour of the assessee. On appeal by the Revenue, the High Court reversed the judgment of the Tribunal and held as follows :

(a) Where the inputs are used in the manufacture of both exempted and dutiable goods, in which event if the register as required by rule 6(2) disclosing a separate record of receipts, consumption and inventory of inputs used in the manufacture of exempt goods and dutiable goods is maintained, the credit can

be taken for the quantity of inputs used in the manufacture of dutiable goods. If records as required by rule 6(2) are not maintained, duty has to be paid in terms of Rule 6(3).

(b) If the manufacturer "without maintaining the books", does not take credit for the duty paid on inputs for manufacture of exempted goods, Rule 6(1) is not satisfied. Rule 6(1) is satisfied only when the requirements of the Rule 6(2) are satisfied, which requires a register to be maintained for separate accounts for receipt, consumption and inventory of the inputs meant for use in dutiable goods and meant for use in exempt goods. The Rule mandates specifically that if an assessee seeks to avail CENVAT credit in respect of inputs in the manufacture of dutiable and exempt goods, the only method by which he can avail credit is by following sub rule(2) provides for maintaining separate accounts.

(c) Rule 6(3) is mandatory if rule 6(2) is not followed. Once the law itself has laid down the method under which credit can be availed, it is that method alone by which the credit can be availed. It is not open to an assesee to contend that some other method is also available and the assessee has the choice of claiming credit or reversing the same.

(d) The decision of the Supreme Court in Chandrapur Magnet Wires Pvt. Ltd. v. Collector (1996) 81 ELT 3 (SC) and Commissioner v. Bombay Dyeing & Mfg. Co. Ltd. (2007) 215 ELT 3 (SC) are not applicable since they do not deal with interpretation of rule 6.

11.3 Proportionate Credit Mechanism ("PCM") w.e.f. 1.4.2008

Rule 6(3) of CENVAT Credit Rules, 2004 has been amended w.e.f. 1.4.2008 to dispense with the 20% restriction and to provide that service provider providing taxable and exempt services and manufacturer of final products availing common input services for excisable as well as exempted goods not maintaining separate accounts of receipt, consumption, inventory of inputs or input services as per Rule 6(2) of CENVAT Credit Rules, 2004, may avail the entire credit on inputs / input services but opt for either of the following:

OPTION 1	manufacturer of final products shall pay 10% (5% w.e.f. 7.7.09) of the value of exempted goods and service provider shall pay 8% (6% w.e.f. 7.7.09) of the value of exempted services and utilize the entire credit available; or
OPTION 2	manufacturer of final products or service provider shall pay the amount equivalent to the CENVAT credit attributable to inputs and input services used in or in relation to manufacture of exempted goods / provision of exempted services subject to compliance of procedure prescribed in Rule 6(3A) of CENVAT Credit Rules, 2004.

In the above context the following needs to be noted:

(a) The options are required to be exercised for all exempted goods / all exempted services. The option so exercised by manufacturer of final products / service provider shall remain in force during the currency of a financial year. This option cannot be withdrawn for the remaining part of the financial year.

(b) The payment envisaged above may be made by debiting the CENVAT credit or otherwise on or before the 5th day of the following month except for the month of March, when such payment shall be made on or before the 31st day of the month of March.

11.4 Comments on PCM

(a) The most significant implication of the amendment is the doing away of the 80:20 restrictions on CENVAT credit utilisation. Service providers have now been granted an option of paying 8% (6% w.e.f. 07.07.09) of the value of exempted services instead, thereby allowing them to avail full CENVAT credit on the common inputs/input services. As an alternative, service provider have been allowed to proportionately reverse the CENVAT credit attributable to the exempted services. This option of proportionate reversal of CENVAT credit has been extended to manufacturer of final products of exempted/ dutiable goods as well.

(b) **OPTION** 1 is similar to the option already available to manufacturer of final products to pay 10% (5% w.e.f. 07.07.09) of the value of exempted goods, with corresponding benefits. An important aspect is the change in the concept of value with effect from 01.04.2008. The value here would mean the value determined under Section 4/4A of Central Excise Act, 1944 as the case may be. For some service provider, this option of paying 8% (6% w.e.f. 07.07.09) on exempted services could be an attractive one and also simple to implement. Service providers who were unable to utilize large amounts of their CENVAT credit balance by exercising the erstwhile option of the 80:20 will stand to benefit as the option releases cash flows inasmuch as the service providers would now be able to utilize the entire CENVAT credit accruing to them during a particular period.

(c) **OPTION** 2 prescribes a set of formula based on which manufacturer of final products and service provider can determine the proportionate amount of CENVAT credit attributable to inputs/input services used for the provision of exempted services/goods and reverse these credits on a monthly basis.

(d) Under the earlier Rule, availing common services for dutiable/exempted goods was faced with an exposure of paying 10% (5% w.e.f. 07.07.09) of the price of exempted goods. Against this, the new proportionate option would be much better.

(e) Manufacturer of final products/service provider would have to carry out an evaluation between the two options, inasmuch as option once exercised for a financial year, cannot be changed during the remainder of that year.

(f) The amended Rule 6(3) does not specifically provide for methodology in cases where common services are availed in cases where manufacturer of final products / service provider is also engaged in trading activity along with manufacturing/ services activities. This needs to be addressed. Refer discussion in para 2.2 in Chapter II : Beneficiaries.

11.5 100% credit in regard to 16 specified services – Provisions unchanged after introduction of PCM

Rule 6 (5) of CENVAT Credit Rules, 2004 provides that 'notwithstanding anything contained in sub-rules (1), (2) and (3) of Rule 6, in case of the input services falling within certain "specified categories", the credit of service tax paid on such services would be fully "allowed" irrespective of the fact that no separate records are maintained unless such services are used exclusively for providing exempted services. The specified services are as under:

Service Category	**Relevant Section of the Finance Act, 1994**
Consulting Engineer	65(105)(g)
Architect	65(105)(p)
Interior Decorator	65(105)(q)
Management or Business Consultant	65(105)(r)
Real Estate Agent	65(105) (v)
Security Agency	65(105)(w)
Scientific or Technical Consultancy	65(105)(za)
Banking and other Financial Services	65(105)(zm)
Insurance Auxiliary Services	65(105)(zy)
Erection, Commissioning and Installation	65(105)(zzd)
Management, Maintenance or Repair	65(105)(zzg)
Technical Testing and Analysis	65(105)zzh)
Technical, Inspection and Certification	65(105)(zzi)
Foreign Exchange Broking	65(105)(zzk)
Commercial or Industrial Construction	65(105)(zzq)
Intellectual Property	65(105)(zzr)

The overriding effect of the provisions of Rule 6(5) vis-a-vis Rule 6(3) has been confirmed in CCE v. M Salgaonkar & Bros Pvt. Ltd. (2008) 10 STR 609 (Tri – Mumbai).

11.6 Procedure to be followed

The procedure prescribed under new Rule 6(3A) of CENVAT Credit Rules, 2004 required to be followed by a manufacturer of final products / service provider is explained hereafter:

Step 1	Intimate in writing to the Superintendent of Central Excise, giving the following particulars: (i) name, address and registration no. of the manufacturer of final products / service provider (ii) date from which the option under this clause is exercised or proposed to be exercised; (iii) description of dutiable goods or taxable services; (iv) description of exempted goods or exempted services; (v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition.
Step 2	Determine and pay provisionally every month, an amount equivalent to CENVAT credit attributable to the manufacture of exempted goods/provision of exempted services in accordance with the formula prescribed in Rule 6(3A)(b) of CENVAT Credit Rules, 2004.
Step 3	Determine finally, the amount of CENVAT credit attributable to exempted goods / exempted services for the whole financial year, in accordance with the formula prescribed in Rule 6(3A)(c) of CENVAT Credit Rules, 2004.
Step 4	Determine shortfall/surplus in the payment of CENVAT credit.
Step 5	Pay the shortfall by 30th June. In case of delay, interest would be payable at the rate of 24% per annum
Step 6	Adjust the excess amount suo moto by taking credit of such amount.
Step 7	Intimate in either case to the jurisdictional Superintendent of Central Excise, within 15 days from the date of the payment/ adjustment giving the specified particulars.

11.7 Absence of taxable/exempt services turnover in the preceding financial year

PCM presupposes existence of taxable as well as exempt turnover in the preceding financial year. However, in cases where there is no taxable as well exempt services and excisable as well as exempted goods turnover in the preceding financial year, PCM specifically provides that proportionate credit is to be worked out on the basis of actual turnover in the financial year and pay the amount so calculated by 30th June of the following financial year.

11.8 Valuation for the purpose of PCM

Value of Taxable / Exempt Services	In accordance with Section 67 of the Act,
Value of Excisable / Exempted Goods	In accordance with Section 4/4A of Central Excise Act, 1944 and Rules framed thereunder.

11.9 Departmental Clarifications

(a) Circular No. 868/6/2008-CX dated 09.5.2008

	Question	**Answer**
1.	Whether an assessee availing option (i) or option (ii) under rule 6(3) is allowed to take CENVAT credit of the duty paid on inputs and input services which are used for both dutiable and exempted goods or service?	Yes, the credit on such inputs and input services is allowed. However, an assessee following option (i) or (ii) under rule 6(3) shall not be allowed to take CENVAT credit of the duty paid on those inputs and input services which are used exclusively for the manufacture of exempted goods or provision of exempted services [refer to Explanation II of rule 6(3)]. For the purpose of the calculation of amount under formula given under rule 6(3A), the total CENVAT credit taken on inputs and input services does not include the excise duty paid on inputs or the service tax paid on input services which are used exclusively for the manufacture of exempted goods or provision of exempted services.

2.	Whether an assessee availing option (i) in respect of certain exempted goods/ services can also avail option (ii) in respect of other exempted goods or services simultaneously?	An assessee opting for either of the option is required to avail the said option for all the exempted goods manufactured by him and all the exempted services provided by him and the option once exercised during a financial year (F.Y.) cannot be withdrawn during the remaining part of the FY. Therefore, the same assessee cannot avail both option (i) and option (ii) simultaneously during a financial year. [Explanation I to Rule 6(3)].
3.	An assessee opting for option (i) is required to pay an amount equivalent to 10% (5% w.e.f. 7.7.09) of the value of exempted goods or 8% (6% w.e.f. 7.7.09) of value of exempted services. What is the scope of term "value" for the said purpose?	Value of the exempted goods is the transaction value as determined in terms of Section 4 of the Central Excise Act, 1944 , or the value determined under Section 4A. However, in case of goods chargeable to specific rate of duty, the value shall be the transaction value to be determined under section 4. Value of the exempted service is the gross amount charged for providing the exempted service [without abatement].
4.	What is the accounting code to be followed by the assessee who is required to pay 8% (6% w.e.f. 07.07. 09) or other amount for the exempted service under Rule 6(3)?	For the present, the assessee can pay the said amount under the accounting code applicable for service tax i.e. 0044.
5.	Whether input services distributor can also opt for option (i) or option (ii)?	As ISD does not provide any service, and is like a trader, the question of availing either of the options would not arise.

6.	Whether export of service without payment of service tax under Export of Service Rules shall be treated as exempted service for the purpose of rule 6(3)?	No, export of services without payment of service tax are not to be treated as exempted services.
7.	What is the manner for calculation of CENVAT credit amount attributable to inputs used in or in relation to the manufacture of exempted goods?	It is required to be done on the basis of actual consumption of the inputs used and the quantification may be made based upon the stores/production records maintained by the manufacturer. Further, a certificate from Cost Accountant/Chartered Accountant giving details of the quantity of the inputs used in the manufacture of exempted goods, value thereof and CENVAT credit taken on these input may be submitted at the end of the year.
8.	Whether credit in respect of input services covered by rule 6(5) would be required to be taken into account for determination of amount payable as per formula provided in rule 6(3A).	No, the credit attributable to services mentioned in sub-rule (5), shall not be taken into account for determination of amount under rule 6(3A).

(b) CBEC Circular No. 870/8/2008 – CX dated 16.5.08

1. The undersigned is directed to refer to Circular No. 599/36/2001 – CX dated November, 2001 [2001 (134) ELT T29], wherein the issue of the applicability of the provision of section 11D of the Central Excise Act, 1944 in cases of the payments made under erstwhile rule 57CC(1) of the Central Excise Rules, 1944 was examined. It has been brought to the notice of the Board that there are some decisions of the Tribunal contrary to the said circular. Further, rule 6 of the CENVAT Credit Rules, 2004, has been amended w.e.f. 1.4.2008, necessitating a re-examination of the circular in the light of these developments.

2. It is seen that the Larger Bench of the Tribunal in the case of Unison Metals Ltd. vs. Commissioner of Central Excise, Ahmedabad – I (2006) 204 ELT 323 (Tri. LB)] has held that section 11D provides that any amount which has been collected as excise duty and not paid to the credit of the Central Government shall be liable to be recovered. The scheme of the Law is that manufacturers shall not collect amounts falsely representing them as central excise duty and retain them, thus, unjustly benefiting themselves. However, in case of the payments made under erstwhile rule 57CC(1), Section 11D of the Act is not applicable since the amount of 6% or 5% has already been paid to the revenue and no amount is retained by the assessee. The said order of the Tribunal has been accepted by the Department.

3. The matter has been examined. Sub – rule (3) of rule 6 of the CENVAT Credit Rules, 2004, has been amended w.e.f. 1.4.2008 to provide for the payment of an amount equal to 5% of the value of the exempted goods, instead of 5% of the price of the exempted goods as provided earlier. The value is to be determined as per section 4 or 4A of the Central Excise Act, 1944 read with rules made thereunder.

4. In the light of what is stated above, it is clarified that as long as the amount of 6% or 5% is paid to the Government in terms of erstwhile rule 57CC of the Central Excise Rules, 1944 or rule 6 of the CENVAT Credit Rules, 2004, the provisions of Section 11D shall not apply even if the amount is recovered from the buyers. However, it may be noted that the CENVAT credit of the said amount of 6% or 5% cannot be taken by the buyer since such a payment is not a payment of the duty in terms of rule 3(1) of the CENVAT credit Rules, 2004. Therefore, the said 5% amount should be shown in the invoice as "5% amount paid under Rule 6 of the CENVAT Credit Rules, 2004".

5. Board's Circular No. 599/36/2001 – CX dated November, 2001 stands withdrawn.

(c) Board's Letter F. No. 137/72/2008 – Cx dated 21.11.08

The issue of restriction of utilisation of accumulated CENVAT credit in terms of erstwhile Rule 6(3)(c) of CENVAT Credit Rules, 2004 has been examined. The following points emerged during its consideration

- Prior to 1.4.2008 [before the amendment in rule 6(3)] the option available to the taxpayer under Rule 6(3), was that, he was allowed to utilize credit only to the extent of an amount not exceeding 20% of the amount of service tax payable on taxable output service. However, there was no restriction in taking CENVAT credit and also there was no provision about the periodic lapse of balance credit. This resulted in accumulation of credit in many cases.

- W.e.f 1.4.2008, under the amended rule 6(3), the following options are available to the taxpayers not maintaining separate accounts;

  (i) Option No. 1 – In respect of exempted goods, he may pay an amount equal to 10% (5% w.e.f 7-7-09) of the value of exempted goods; and in respect of exempted / non taxable services, he may pay an amount equal to 8% (6% w.e.f. 7-7-09) of the value of such exempted / non – taxable service.

  (ii) Option No. 2 - He may pay an amount equivalent to CENVAT credit attributable to inputs and input services attributable to exempted goods/dutiable goods and taxable/ exempted services.

- As stated earlier, many taxpayers had accumulated CENVAT credit balance as on 1.4.2008 The matter to be considered was whether this credit balance should be allowed to be utilized for payment of service tax after 1.4.2008.

- As no lapsing provision was incorporated and that the existing Rule 6(3) of the CENVAT Credit Rules does not explicitly bar the utilization of the accumulated credit, the department should not deny the utilization of such

accumulated CENVAT credit by the taxpayer after 1.4.2008. Further, it must be kept in mind that taking of credit and its utilization is a substantive right of a taxpayer under value added taxation scheme. Therefore, in the absence of a clear legal prohibition, this right cannot be denied.

11.10 Case Study

In order to facilitate easy understanding, newly introduced PCM is explained through a simple practical case study enclosed as **Annexure 11.1.**

11.11 Provisions of Rule 6 not to apply in certain cases

The provisions of proportionate credit under Rule 6 (1), (2), (3) and (4) of CENVAT Credit Rules, 2004 will not aply if the excisable goods removed without payment of duty are either:

(i) cleared to a unit in a SEZ; or to a developer of a SEZ for their authorized operations; or

(ii) cleared to a 100% EOU; or

(iii) cleared to a unit in an EHPT or STP; or

(iv) supplied to the United Nations or an International Organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification No.108/ 95 – CE dated 28.8.95; or

(v) cleared for export under bond in terms of Central Excise Rules, 1944; or

(vi) gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of the manufacture of copper or zinc by smelting; or

(vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India and supplied against International competitive bidding in terms of Notification No. 6/2002 – CE dated 1.3.02 or Notification No. 6/06 – CE dated 1.3.06; or

(viii) goods exempt from basic customs duty and additional duty leviable under section 3(1) of the Customs Tariff Act are supplied to mega power projects from which power supply has been tied up through tariff based competitive bidding or where the project is awarded to a developer through tariff based competitive bidding; or

(ix) supplied for the use of foreign diplomatic missions or consular missions or career consular offices or diplomatic agents in terms i.e. the provisions of Notification No. 6/2006 CE dated 01.03.06.

11.12 Opportunity to resolve pending disputes

A retrospective amendment has been made in Rule 6 with effect from 10.9.2004 to provide that if a dispute relating to adjustment of credit on inputs or input services used in or in relation to manufacture of exempted final products for the period between 10.9.2004 to 31.3.2008 is pending as on 08.05.10 (the date of the enactment of the Finance Bill, 2010), a manufacturer availing CENVAT credit in respect of any inputs or input services and manufacturing final products which are dutiable as well as exempted may pay an amount equivalent to CENVAT credit attributable to the inputs or input services used in or in relation to the manufacture of exempted goods before or after the clearance of such goods. However, the manufacturer shall pay interest at the rate of 24% p.a. from the due take from memorandum date till the date of payment.

ANNEXURE 11.1

CASE STUDY

Facts

(a) X is an output service provider providing taxable as well as exempted services. Turnover of services of X during the year ended 31.3.10 is as under:

(i)	Value of exempted services	40,00,000
(ii)	Value of taxable services	60,00,000
	Total	**1,00,00,000**

(b) Details of CENVAT credit likely to be availed by X during the month of April' 2010 are as under:

(i)	CENVAT credit on input services	50,000
(ii)	The above CENVAT credit on input services includes the following:	
	(a) Credit on input services falling under 16 specified services [Rules (6)(5) of CENVAT Credit Rules, 2004]	10,000
	(b) Credit on input services exclusively used for provision of exempted services	10,000
	(c) Credit on input services exclusively used for provision of taxable services	10,000

(c) Turnover during the month of April, 2010 of X is likely to be as under:

(i)	Exempt services	4,00,000
(ii)	Taxable services	6,00,000
	Total	10,00,000

What would be X's entitlement to CENVAT credit?

1. CENVAT credit on input services attributable to rendering of exempted services during April, 2010

View 1	View 2
$\frac{40,00,000}{1,00,00,000} \times 30,000$ [50,000 - 20,000] [See Note below] = 12,000	$\frac{40,00,000}{1,00,00,000} \times 20,000$ [50,000-30,000] [See Note below] = 8,000
Note	**Note**
➢ 10,000 is deducted for exempted services ➢ 10,000 is deducted for 16 specified services	➢ 10,000 is deducted for exempted services ➢ 10,000 is deducted for 16 specified services ➢ 10,000 is deducted for input services exclusively used for provision of taxable services
	This view would be appropriate as the credit of the services tax paid on 16 specified services can be claimed in full unless used exclusively for providing exempted services or for manufacture of exempted goods.

2. Amount Payable under Exempted Option

6% of 4,00,000	24,000

3. Total amount of CENVAT credit to be reversed by X for the month of April, 2010

	View 1	View 2
CENVAT credit on the inputs services attributable to exempted services [as per Point 1 above]	12,000	8,000

Add: CENVAT credit on input services used exclusively for provision of exempted services	10,000	10,000
Total	**22,000**	**18,000**

4. CENVAT credit balance position

(A)	**Proportionate credit option**		
	Credit on inputs services [as per (b)(i)]	50,000	50,000
	Less: Reversal [as per 3 above]	22,000	18,000
CENVAT credit balance available for set off		**28,000**	**32,000**

(B)	**Exempted option**	**View 1**	**View 2**
	Credit on input services [as per (b)(ii)]	50,000	50,000
	Less: Credit for exempted service	10,000	—
	Less: Payment on exempted services [as per 2 above]	24,000	24,000
CENVAT credit balance available for set off		**16,000**	**26,000**

CHAPTER XII

Distribution of Credit

12.1 General

(a) A manufacturer of final products or service provider may have a head office/ regional office/other offices at locations other than where the manufacturing activity/service activity is carried out. The services and/or invoices for services availed may be received at such head office/regional offices or other offices. Provisions have been made under CENVAT credit Rules, 2004 for a manufacturer of final products/service provider to avail CENVAT credit of services and/or invoices for services received and paid at such head office/ regional office/other offices through Input Service Distributor (ISD) mechanism (Rule 7 of the CENVAT Credit Rules, 2004).

ISD mechanism is subject to the fulfillment of various compliances specified under CENVAT Credit Rules, 2004. Important compliances are explained hereafter.

(b) ISD

In terms of Rule 2(m) of CENVAT Credit Rules, 2004, "input service distributor" means an office managing the business of manufacturer of final products or service provider which receives invoices issued under rule 4A of Service Tax Rules (STR), 1994 towards purchases of input services and issues invoice, bill or, as the case may be, challan for the purposes of distributing the credit of service tax paid on the said services to such manufacturer of final products or service provider, as the case may be. This provides a way in which a manufacturer of final products or service provider can distribute the credit on invoices for the input services received at the head office/branch office or administrative office, to its manufacturing units/factories or premises providing output service. Had this provision been absent, the department could very well have sought to deny credit on such invoices addressed to a location

other than the factory or premises from where the output service is provided.

12.2 Procedures and Compliances

(a) Registration

Though the scheme of CENVAT Credit Rules, 2004 has been introduced w.e.f. 10.9.04, Registration of ISD, has been made mandatory only w.e.f. 16.6.05 vide Service Tax (Registration of Special Category of Persons) Rules, 2005 [Refer Notification No. 27/05- ST dated 7.06.05].

(b) Document eligible for CENVAT credit

As per Rule 9 (1)(g) of CENVAT Credit Rules, 2004, invoice, bill or challan issued by an ISD under Rule 4A of STR is an eligible document for the purpose of taking CENVAT credit.

(c) Distribution of Credit

ISD can distribute CENVAT credit in respect of the service tax paid on input services received and/or invoices for services availed at H.O./regional office/ other offices, amongst its manufacturing units or locations providing output service. However, distribution of credit by ISD, is subject to the following conditions:

(i) Credit distributed should not be more than the service tax paid on input services/invoices for services received by ISD.

(ii) If an input service is attributable to the service used in a unit exclusively engaged in manufacture of exempted goods or providing exempted services, the credit of service tax cannot be distributed by ISD.

Subject to the above restriction, the quantum and manner of credit distribution, is left to the discretion of ISD. For administrative convenience, ISD can periodically (preferably monthly) issue an “invoice, bill or challan” after consolidating the service tax paid on the input services received during the month.

(d) Details of duties / taxes

ISD is required to give a break up of various duties, service tax, education cess paid on goods, counterveiling duty paid on

imported goods equivalent to above, education cess on taxable services etc. This break up is required as the credit of education cess is not interchangeable with any other duty. The factory/premises to which the ISD sends his invoice can avail CENVAT credit of corresponding duties only.

(e) Requirements of invoice

As per Rule 4A (2) of STR 1994, the requirements of the invoice, bill or challan are as under:

- Invoice should be signed by an authorized person,
- Invoice should be issued for each recipient of the credit distributed,
- Invoice should be serially numbered,

The said invoice should contain following details:

- Name and address and registration number of the person providing input services and serial number and date of invoice, bill or challan issued by service provider under Rule 4A(1) of STR.
- Name, address and registration number of input service distributor.
- Name and address of the recipient of the credit distributed.
- Amount of credit distributed.

(f) Returns

Under Rule 9(10) of CENVAT Credit Rules, 2004, an ISD is required to furnish half yearly return in the prescribed form (viz. Form ST 3) giving details of the credit received and distributed during the said half year to the jurisdictional Superintendent of Central Excise not later than the last day of the month following the half year period.

12.3 Distribution of credit on inputs / capital goods

(a) With effect from 1.4.2008, a new Sub – Rule 7A has been introduced under CENVAT Credit Rules, 2004, which provides as under :

"Service provider can avail CENVAT credit on inputs/capital goods on the basis of an invoice, bill or challan issued by an office or premises of such service provider, which receives the

invoices issued in terms of Central Excise Rules 2002 for the purchase of such inputs / capital goods."

(b) The provisions of CENVAT Credit Rules, 2004 / other Rules, as applicable to a first stage dealer/second stage dealer under central excise, shall *mutatis mutandis* apply to such office or premises of such service provider.

(c) It should be noted that, the provisions of distribution of the credit on inputs/ capital goods do not apply to manufacturer of final products. A manufacturer of final products can only follow the provisions of Rule 3 of CENVAT Credit Rules, 2004, with regard to the reversal of credits when he sends inputs/ capital goods to his other units or to other entities and such consigning would be under an invoice in accordance with Rule 11 of Central Excise Rules, 2002. Where he happens to be a trader, he would have to register as a dealer under central excise for passing on the credit of the duty paid by the manufacturer to his customer on a pro-rata basis.

12.4 Some Judicial Rulings

(a) ISD not a mere dealer–Dealer passes on duty paid without taking responsibility on eligibility to CENVAT credit of buyers – ISD independently received invoice and comparable to buyer of goods or services–Document issued by ISD for passing credit not contain details as to nature of service provided – ISD required to prove eligibility to credit as details on nature of service absent at receiving branch or factory.

[CST v Godfrey Philips India Ltd (2009) 14 STR 375 (Tri – Ahd)]

(b) In terms of Rule 7 of CENVAT Credit Rules, 2004 and Master Circular dt. 23.8.07 credit not to exceed amount of tax paid and credit should not be attributable to services used in manufacture of exempted goods or providing exempted services. Restriction sought to be applied in limiting distribution of credit made in respect of Malur unit on the ground that services used in Cuttack unit finds no mention in relevant rules. Impugned order set aside.

[ECOF Industries Pvt. Ltd. v CCE (2009) 17 STR 515 (Tri – Bang)]

CHAPTER XIII

Documentation, Records and Returns

13.1 Tax/duty paid documents

(a) CENVAT credit can be availed by a manufacturer of final products/service provider/ISD only on the basis of the documents specified under Rule 9(1) of CENVAT Credit Rules, 2004. A list of such documents is enclosed as **Annexure 13.1** for ready reference.

(b) It is further necessary to ensure that all the particulars prescribed under the following Rules:

- Central Excise Rules, 2002
- Service Tax Rules, 1994

are contained in the tax/duty paid document. It may be noted that the manufacturer of final products or service provider obtaining the inputs/capital goods/input service should satisfy himself about the identity and address of the supplier or provider of service on the basis of the declaration and contents on the invoice made available to him. Ensuring that the contents required by the aforesaid Rules have been indicated on the invoice would enable him to safeguard his interests and avail CENVAT credits. Generally there is no requirement for the manufacturer of final products/service provider to go beyond the documentation available in order to confirm the identity of the supplier/input service provider or to confirm the fact of payment of duties/taxes indicated on such an invoice/bill.

(c) It has been provided under proviso to Rule 9(2) of CENVAT Credit Rules, 2004 that if such duty/tax paid documents do not contain all the prescribed particulars but contain the following information :

- Duty or service tax payable
- Description of goods or taxable service
- Assessable value

- Central excise or service tax registration number of the person who issues the invoice
- Name and address of the factory, or warehouse or premises of first stage / second stage dealer or service provider

and if the Deputy Commissioner/Assistant Commissioner is satisfied that the goods or services covered by the tax/duty paid document have been received and accounted for in the books of accounts of the receiver, he may allow CENVAT credit.

(d) Under MODVAT/CENVAT, it is very commonly found that, central excise/service tax authorities have a tendency to disallow CENVAT credit on the ground that all the prescribed details are not stated in the duty/tax paid document.

If the particulars stated in para (c) above are mentioned in the tax / duty paid document and other conditions under CENVAT Credit Rules, 2004 are duly complied with, reliance can be placed on an important principle laid down by Supreme Court in Mangalore Chemicals & Fertilizers Ltd vs. Dy. Commissioner (1991) 55 ELT 437 (SC) viz.:

"There is a distinction between the procedural condition of a technical nature and substantive condition and that non – observance of the former is condonable while that of a latter was not condonable".

The above principle has been followed in a large number of judicial cases under MODVAT/CENVAT. The same remains very much relevant for CENVAT Credit Rules, 2004 as well.

13.2 Records

(a) Record of inputs and capital goods

The manufacturer of final products/service provider/ISD is required to maintain proper records for the receipt, disposal, consumption and inventory of the inputs/capital goods. The record should contain relevant information regarding the following :

(i) Value of input/capital goods

(ii) Duty paid (specify types of duties, EC, SHEC etc.)

(iii) Person from whom inputs / capital goods have been procured.

(iv) Nature and description of goods**.**

(b) Record of input services

The manufacturer of final products / service provider/ ISD is required to maintain proper records for the receipt and consumption of the input services. The record should contain relevant information regarding the following :

(i) Value of service

(ii) Tax paid (specify ST, EC, SHEC etc.)

(iii) Person from whom input service has been procured

(iv) Nature and description of services.

Rule 9(6) under CENVAT Credit Rules, 2004 specifically prescribes the maintenance of records for receipt and consumption of services. Since services are, essentially intangible compared to goods which are tangible, there is absolutely no clarity as to what type of records are contemplated under CENVAT Credit Rules, 2004. CBEC needs to speedily address this matter. A service provider / manufacturer of final products however should maintain the following –

- Agreement with the input service provider for the purpose of obtaining the service. The agreement should be clear as to the nature of services being obtained, the components involved and the consideration for the services involved.
- Proper ledgers for accounting the liability on such services to service provider and the payment made on them.
- Proper identification and segregation of the CENVAT credit amount on such services where credits are available.
- Link between the credits and the date on which the payment had been made to the input service provider with payment reference.

- Details of the input service provider with address, value for the service and the bill reference for the service.
- Summary of the usage of the service to the extent possible in terms of the products manufactured or output service provided. This should be possible where the user departments have a system of recording the details of the services consumed in their departments.

As per Rule 6(2) of CENVAT Credit Rules, 2004 where a manufacturer of final products/service provider manufacturing excisable/ exempt goods and providing taxable/exempt services uses common inputs or input services both for excisable/ exempt goods and taxable/exempt services, depending upon the option exercised under Rule 6, he is required to maintain separate records for the receipt, consumption and inventory of input/input services for:

- manufacture of excisable goods / providing taxable service
- manufacture of exempted goods / providing exempted service

However, the above would not be required, in regard to 16 services specified under Rule 6(5) of CENVAT Credit Rules, 2004 unless used exclusively for providing exempted services.

Where a manufacturer of final products is required to maintain a separate account of the receipt, consumption and inventory of inputs, he should make it a point to segregate the stocks right from the point of receipt in his factory. This can be done through a system of having distinct series of goods receipt notes which would distinguish the stocks meant for use in the manufacture of exempted goods from those meant for use in the manufacture of dutiable goods. This should be followed up with separate stock ledgers for recording inventory along with a separate physical storage.

Issues for consumption can be identified through the use of distinct series of issue slips as well as production reports (job cards, route cards etc. This mechanism would ensure that the manufacturer of final products has a separate record of the stock movement right from point of receipt of materials and up to the point of dispatch of finished goods. This system would

be easier to follow where the manufacturer of final products has computerized his record keeping tasks.

(c) CENVAT credit record

CENVAT credit record should be maintained on the lines of Personal Ledger Account (PLA). It is a current account of CENVAT credit received, credit utilized and credit balance. This should give details of the following :

(i) Credit availed against each input/capital goods

(ii) Credit availed for input services

(iii) Credit utilized against the clearance of final products or removal of input as such or after processing or removal of capital goods as such

(iv) Credit utilized against output service

(v) Balance credit available.

It is preferable if the details of the input credits, capital goods credits and input service credits are segregated on the CENVAT register so that each segment can be quantified and identified separately.

(d) Format of records

CENVAT Credit Rules, 2004, as such do not prescribe any format in which records are to be maintained by a manufacturer of final products/service provider.

Proforma/specimen of formats in which records may be maintained are enclosed as under for reference :

(i)	CENVAT Stock Account (Inputs)	**Annexure 13.2**
(ii)	CENVAT Credit Account (Inputs)	**Annexure 13.3**
(iii)	CENVAT Stock Account (CG)	**Annexure 13.4**
(iv)	CENVAT Credit Account (CG)	**Annexure 13.5**
(v)	Record of CENVAT Credit Availed Service Tax	**Annexure 13.6**
(vi)	CENVAT Credit Account (Service Tax Summary)	**Annexure 13.7**

It needs to be expressly noted that, formats/specimen enclosed, are only of an illustrative nature. The same would have to be suitably modified depending upon the activities/requirements of a manufacturer of final products/service provider and the reporting capabilities that have been developed and exist within the organization. Generally, organizations which have gone in for ERP software should not have difficulties in meeting the requirements as long as the required data is available and can be put in a reportable format. Problems could arise where a manufacturer of final products/service provider uses more than one software package within the organization for transaction recording or the system is partially computerized. Unless and until there is a software which can satisfactorily meet the reporting requirements under Central Excise Act, 1944 or under service tax, it would be better to maintain the records off line or manually especially in case of SMEs.

(e) Preservation of records

Though no specific mention is made under CENVAT Credit Rules, 2004, it would appear that records maintained for the purposes of CENVAT credit availment and the utilization should be preserved for a period of 5 years immediately after the financial year for which such record pertains.

In cases where there are disputes, it would be advisable to preserve records till the dispute is finally resolved.

(f) Onus for maintenance of records

Under CENVAT Credit Rules, 2004, onus as to the maintenance of records is on the manufacturer of final products/service provider availing CENVAT credit. Hence, it is absolutely essential for the manufacturer of final products/service provider to ensure that appropriate records are maintained for CENVAT credit availed/utilized and should the need arise, enable him to reply to the central excise/service tax authorities in case of audit, enquires etc, satisfactorily.

13.3 Returns

(a) Returns by a manufacturer of final products

Form of return	Description	Who is required to file	Time limit for filing return
ER – 1 [Rule 12(1) of Central Excise Rules, 2002]	Monthly return by large units	Manufacturers not eligible for SSI concession	10th of the following month
ER – 2 [Rule 12(1) of Central Excise Rules, 2002]	Return by EOU	EOU units	10th of the following month
ER – 3 [Proviso to Rule 12(1) of Central Excise Rules, 2002]	Quarterly return by SSI Units	Assessees availing SSI concession	20th of next month of the quarter
ER – 4 [Rule 12(2) of Central Excise Rules, 2002]	Annual Financial Information /	Assessees paying duty of Rs. one crore or more per annum through PLA or by utilizing CENVAT credit.	Annually by 30th November of the succeeding year
ER – 5 [Rule 9A(1) and 9A (2) of CENVAT Credit Rules, 2004	Information relating to principal inputs	Assessees paying duty of Rupees one crore or more per annum through PLA or by utilizing CENVAT credit and manufacturing goods under specified tariff headings	Annually, by 30th April for the current year.

ER – 6 [Rule 9A(3) of CENVAT Credit Rules, 2004	Monthly return of the receipt and consumption of each of principal inputs	Assessees required to submit ER-5 return	10th of the following month
ER 7 (Rule 12(2A) of Central Excise Rules, 2002)	Annual Installed Capacity Statement	All assesses except the ones exempted under Notification No. 26/2009 CE(NT) dated 18.11.2009	Annually by 30th April of the succeeding financial year

(b) Return by a first stage dealer / second stage dealer

Form of Return	Description	Who is required to file	Time limit
Return under Rule 9(8) of CENVAT Credit Rules, 2004	Quarterly return	First stage/second stage dealer	15 days from the end of quarter

(c) Return by a service provider

Form of Return	Description	Who is required to file	Time limit
No specified format other than in ST–3 [Rule 9(9) of CENVAT Credit Rules, 2004]	Half yearly return	Person liable to pay service tax	Within one month from the end of the half year *(to be filed by 25th)

(d) Return by ISD

Form of Return	Description	Who is required to file	Time limit
Form ST 3 [Rule 9(10) of CENVAT Credit Rules, 2004]	Half yearly return	ISD	Within one month from the end of half year

(e) E-filing of returns

(i) Manufacturer of final products - With effect from 01.04.2010, a proviso has been inserted in rule 12(1) of the Central Excise Rules, 2002 to provide that where an assessee has paid total duty of rupees ten lakh or more including the amount of duty paid by utilization of CENVAT credit in the preceding financial year, he shall mandatorily file the monthly on quarterly return, as the case may be, electronically. Earlier the facility of e-filing of ST-3 returns was optional.

(ii) Service provider – With effect from 1.4.2010, a proviso has been inserted in rule 7(2) of the Service Tax Rules, 1994 to provide that where an assessee has paid a total service tax of rupees ten lakh or more including the amount paid by utilizations of CENVAT Credit in the preceding financial year, he shall mandatorily file the return (ST-3) electronically. Earlier the facility of e-filing of ST-3 returns was optional.

CBEC has issued a comprehensive Circular No. 919/091/2010 CX dated 23.3.2010 outlining the procedure for electronic filing of excise and service tax return and electronic payment of taxes under their project of Automation of Central Excise and Service Tax (ACES).

13.4 Some judicial rulings

(a) Address of the service provider not relevant for purpose of tax credit – If tax remains paid, credit would follow.

[General Electric International Inc. vs. CST (2006) 4 STR 90 (Tri. Del).

(b) Banker's address instead of appellant's address mentioned in Bill of Entry. No denial as to the receipt of machine in the factory of appellant – MODVAT Credit cannot be denied – Rule 57G of Central Excise Rules, 1944 – Rules 3 and 9 of CENVAT Credit Rules, 2004.

[Aradhana Beverages & Foods Co. Ltd. vs. CCE (1999) 114 ELT 752 (Tribunal)]

(c) Availment of credit on the basis of original copy of invoice – Denial of credit on ground that the same was taken without taking/applying for required permission of the competent authority. As per concurrent findings of the fact recorded by two lower appellate authorities, duty paid character of inputs, and their receipt in manufacturer's factory and utilization in manufacture of final products, not disputed – Hence, credit not deniable on merits – No infirmity in impugned order – Rule 57G(6) of Central Excise Rules, 1944, Rule 9 of CENVAT Credit Rules, 2004.

[CCE vs. Ralson India Ltd. (2006) (202) ELT 759 (P & H)].

(d) Endorsed Bill of Entry – Only a part of goods covered by bill of entry, which were sold to assessee, and not entire imported consignments in original packing, alleged – Since goods were part of imported consignments on which duty was paid and were delivered to and received by assessee, denial of credit on procedural ground not proper – Rule 57G of Central Excise Rules, 1944.

[CCE vs. Sunder Castings Pvt. Ltd. (2007) 7 S.T.R. 24 (Tri. – Mumbai)]

(e) Validity of credits in respect of the service tax paid on goods transport agency services availed on the basis of TR-6 Challan – Objection that TR – 6 Challan is not a valid duty paying document does not stand as Revenue failed to mention as to what was specified document for availing the credit during relevant time – When it is not the case of Revenue that service tax not paid by respondents, or not otherwise entitled to credit of same, TR-6 Challan has to be considered a proper document reflecting payment of tax – Credit admissible – Rule 9 of CENVAT Credit Rules, 2004.

[CCE v. Essel Pro – Pack Ltd. (2007) 8 STR 609 (Tri. – Mumbai)]

(f) The credit in respect of security agency service disallowed on the bills which did not provide specific name and address – Assessee produced certificate before Commissioner (Appeals) to establish that the services had been rendered by service provider to them – No fault can be found on the reliance placed by Commissioner (Appeals) on the certificate produced before him in this regard – Rule 9 of CENVAT Credit Rules, 2004.

[CCE vs. Diamond Cements (2008) 10 STR 160 (Tri – Del)]

(g) Invoices issued by the dealer from premises other than for which Central Excise registration was granted – Credit not to be denied in view of Board's Circular No. 441/7/99 dated 23-2-1999 as well as Notification No.7/99 C.E. amending Rule 57G of Central Excise Rules, 1944

[CCE vs. Myron Electricals Pvt. Ltd. (2008) 11 STR 674 (P & H)]. This case was also maintained by the Supreme Court in 2007 (215) ELT A76 (SC).

(h) Credit denied as the address mentioned in invoice not registered with Revenue authorities – Registration Certificate subsequently amended to include the address mentioned in invoice with retrospective effect – Order denying credit set aside – Rule 9 of CENVAT Credit Rules, 2004.

[Raaj Khosla & Co. Pvt. Ltd. vs. CST (2008) 12 STR 627 (Tri. – Del)]

(i) Bill of entry (triplicate copy) misplaced - Information about the same given to Police and Customs Authorities - Credit, held as admissible on a photo copy of bill of entry certified by Banker, Notary & Customs Authorities.

[Vardhaman Acrylics v CCE (2006) 4 STR 489 (Tri – Mumbai)]

(j) Tribunal order allowing credit on production of certificate from manufacturer showing payment of duty invoice wise-credit held in the said order as non small deniable merely because invoice issued by non-registered dealer – Finding of Tribunal that claim of credit genuine, goods received and duty paid on inputs – Question of law not arises – Impugned order held as sustainable.

[CCE v JCT Limited (2009) 13 STR 22 (P&H)]

ANNEXURE 13.1

LIST OF TAX / DUTY PAID DOCUMENTS

(a) An invoice issued by –

(i) a manufacturer for the clearance of –

(I) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer;

(II) inputs or capital goods as such;

(ii) an importer;

(iii) an importer from his depot or from the premises of the consignment agent of the said importer if the said depot or the premises, as the case may be, is registered in terms of the provisions of Central Excise Rules, 2002;

(iv) a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of Central Excise Rules, 2002; or

(b) A supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short-levy by reason of fraud, collusion or any willful misstatement or suppression of facts or contravention of any provisions of the Excise Act, or of the Customs Act, 1962 or the rules made thereunder with the intent to evade payment of duty.

Explanation - For the removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional amount of additional duty leviable under section 3 of Customs Tariff Act.

(c) A bill of entry; or

(d) A certificate issued by an appraiser of customs in respect of the goods imported through a foreign post office; or

(e) A challan evidencing the payment of the service tax by the person liable to pay service tax under sub – clauses (iii), (iv) (v) and (vii) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994; or

(f) An invoice, a bill or challan issued by a provider of input service on or after the 10th day of September, 2004; or

(g) An invoice, bill or challan issued by an input service distributor under rule 4A of the Service Tax Rules, 1994.

ANNEXURE 13.2

CENVAT STOCK ACCOUNT (Inputs)								
Sr. No.	Date of receipt in the factory premises	Description of inputs	Quantity received	Details of Invoice/ Challan/ Bill of Entry etc.	Name of the Supplier	Excise Control Code No. of Supplier	Issues for use for Manufacture of Finished Product	
							Chit No.	Qty.
1	2	3	4	5	6	7	8	9

Issued for clearance as such				Balance Quantity	Remarks
On payment of duty		Otherwise			
Invoice/ Challan No. and Date	Qty.	Document particulars	Qty.		
10	11	12	13	14	15

Note

The above format can be suitably modified for a service provider. A manufacturer of final products can even have a conventional stock account showing quantitative details of materials received, issued and consumed provided the details of the receipt and issue document are available and their reference as well as reference as to production report, has been quoted on the CENVAT credit register.

ANNEXURE 13.3

CENVAT CREDIT ACCOUNT (Inputs)								
Sr. No.	Date	Opening balance		Document particulars of fresh credit allowed		Amount of duty credited		
		Balance of excise duty and CVD	Other duties * (Specify)	Invoice/Challan /Bill of Entry / Other Approved Document Details	Excise Control Code No. of Buyer	Basic Excise Duty	CVD	Other Duties * (Specify)
1	2	3a	3b	4a	4b	5a	5b	5c

Total Credit Available		Debits			Balance of Credit		
Basic excise duty and CVD	Other duties* (Specify)	Invoice Challan/Bill of Entry/ Other Approved Document Details	Basic Excise Duty	Other Duties * (Specify)	Basic Excise duty and CVD	Other Duties* (Specify)	
6a	6b	7	8	9	10a	10b	11

Note

The above format can be suitably modified for a service provider.

*EC, SHEC etc.

ANNEXURE 13.4

CENVAT STOCK ACCOUNT

(Capital Goods)

Sr. No	Date of receipt in the factory premises	Description of capital goods recd.	Identification Marks and Brand Name	Qty. Recd	Details of Invoice/ Challan/ Bill of Entry,	Name of Supplier	Excise Control Code No. of Supplier	Issue for installation / use for manufacturer of final products	
1	2	3	4	5	6	7	8	9	10

Place and Date of Installation / Use in factory			Removal of capital goods as such				Balance Quantity	Corresponding Folio and Entry No. in CENVAT Credit A/c	Remarks
			On payment of duty		Otherwise				
Place	Date of Installation	Date of Starting of use							
11	12	13	14	15	16	17	18	19	20

Note

The above format may be suitably modified for a service provider.

ANNEXURE 13.5

CENVAT CREDIT ACCOUNT

(Capital Goods)

Sr. No.	Date	Op Balance		Particulars of Fresh Credit Allowed				Total Credit available
		Balance Excise Duty and CVD	Other duties* (Specity)	Invoice/ Challan/ Bill of Entry/ Other Approved Document Details	Excise Central Code No. of buyer	Basic Excise Duty and CVD	Other Duties* (Specify)	
1	2	3a	3b	4a	4b	5a	5b	6

Debit			Balance of Credit		Remarks
Invoice / Challan / Bill of Entry / Other Approved Document Detail	Basic Excise Duty and CVD	Other Duties * (Specify)	Basic Excise Duty and CVD	Other Duties * (Specify)	
7a	8a	8b	9a	9b	10

- EC, SHEC etc

ANNEXURE 13.6

RECORD OF CENVAT CREDIT AVAILED

(Service Tax)

Sr. No.	Service Tax Invoice No.	Details of Input Service Provider		Services Category
		Name	Address	
(1)	(2)	(3a)	(3b)	(4)

Gross amount for Taxable Service	Service Tax	EC	SHEC	Total	Date of payment with payment reference
(5)	(6)	(7)	(8)	(9)	10

ANNEXURE 13.7

CENVAT CREDIT ACCOUNT

(Service tax summary)

Date	Op. Balance			Credit Availed during the month		
	ServiceTax	EC	SHEC	Service Tax	EC	SHEC
(1)	(2a)	(2b)	(2c)	(3a)	(3b)	(3c)

Credit utilized during the month			Closing Balance		
Service Tax	EC	SHEC	Service Tax	EC	SHEC
(4a)	(4b)	(4c)	(5a)	(5b)	(5c)

CHAPTER XIV

Transfer of Credit

14.1 Statutory provisions

The statutory provisions contained in Rule 10 of CENVAT Credit Rules, 2004 can be briefly stated as under:

(a) Transfer of unutilized balance in CENVAT credit account by manufacturer of final products or service provider is permitted in case of a change in ownership or change in site resulting from the following:

- Sale
- Merger
- Amalgamation
- Lease or
- Transfer to a joint venture

(b) The arrangement of a transfer should explicitly provide for the transfer of the liabilities of the old factory**.**

(c) According to Rule 10(3) of CENVAT Credit Rules, 2004, the stock of inputs or in process or capital goods should also be transferred along with the factory to the new site or ownership. The same should be duly accounted to the satisfaction of the Deputy Commissioner/Assistant Commissioner.

14.2 All situations of restructuring not covered

Rule 10 of CENVAT Credit Rules, 2004 provides for the transfer of unutilised CENVAT credit balance only in 5 specific situations, viz. sales, merger, amalgamation, lease or transfer to a joint venture.

An issue could arise as to what would happen in a case not strictly falling under the aforesaid specific situations. It is felt that, technically, there could be difficulties. The manufacturer of final products / service provider though has the option to clear goods under rule 3 of CENVAT Credit Rules, 2004 which can be examined where Rule 10 is found to be inapplicable. This, however, may not consume the credit in full.

14.3 Capital goods

Under CENVAT Credit Rules, 2004 in regard to capital goods only 50% of the credit can be availed in the year of receipt of such capital goods and the balance 50% can be availed only in the subsequent year.

In case of business restructuring, if 50% of the credit is availed by a company prior to merger, issues could arise as to whether in such cases the balance 50% can be availed by the new entity after merger. In such cases technical objections towards availment of the credit by the new entity from the Authorities cannot be ruled out.

14.4 Some judicial rulings

(a) Leased out capital goods remaining at place of installation – Credit of the duty taken by lessor utilized by them and nothing remaining for transfer to lessee – HELD : Credit availed by lessor was not required to be transferred to department.

Capital goods – Leased out along with unit – 50% of credit of duty availed when unit was not in possession of lessee – However, entry regarding same reversed and was never utilized – Availment of credit was irregular.

[Sri Chamundeshwari Sugars Ltd. v. CCE (2007) 217 ELT 65 (Tri – Bang)]

(b) Shifting of factory from one site to another after permission from Department – In a case where, no stock of inputs as such or in process at time of shifting, – Plea that actual or physical transfer of inputs along with capital goods is necessary for credit transfer, was held as illogical inasmuch as it would mean that the transfer of factory from one site to another is not permissible if inputs completely utilized in manufacture of final goods – Since there was no case of Revenue that inputs on which credit availed not duly accounted, transfer of credit to sister unit held admissible.

[Shree Rama Multi-Tech Ltd. vs. CCE (2007) 217 ELT 136 (Tri. – Chennai)]

(c) Transfer of generating set from one unit to another - Balance sheet showing that only legal entity is Sangam India and

various activities like power generation, spinning, processing are all separately accounted – Common premises, integrated use of resources continued all along – No separation of entity through demergers, only separate internal account keeping which is common practice for management control and appraisal – Separate excise registration for each product under manufacture is also no proof of separate manufacture of each item – It was held that there was no transfer of equipment to attract reversal of the credit.

[Sangam Spinners vs. CCE (2007) 208 ELT 386 (Tri – Del)]

(d) Amalgamation of unit – Manufacturer opting for exemption, based on value or quantity of clearances in a financial year, required to pay an amount equivalent to the CENVAT credit in respect of inputs lying in stock or in process or contained in final products lying in stock on the date when such option is exercised and after deducting the said amount if any balance is lying, then such balance would lapse – Appellants having already reversed the credit on input lying in stock, work in progress and finished goods, Rule 10(3) of CENVAT Credit Rules, 2004 held as not applicable and credit lying unutilized available for transfer.

Amalgamation of unit – Appellants informed the department about stopping the production activities in the Pondicherry unit after the amalgamation – Duty on stock of raw material and finished goods lying as on 9.7.2004 – Appellants held as entitled for transfer of the credit.

[Hewlett Pacard (I) Sales (P) Ltd. vs. CCE (2007) 211 ELT 263 (Tri – Bang)]

(e) Acquisition, taking over of liabilities – Assessee furnished undertaking to take over current and future liabilities of taken over unit that may arise up to date of surrendering of registration certificate by latter – Registration surrendered and accepted by customs. It was held that requirement of Rule 10 of CENVAT Credit Rules, 2004 fulfilled.

[Relene Petrochemicals Pvt. Ltd. vs. CCE (2007) 215 ELT 254 (Tri – Mumbai)]

(f) Transfer of unutilized credit on shifting of factory to another place – Assessee completed their projects at Hyderabad and shifted entire machinery along with books of accounts to Bangalore unit – Both units managed by the same unit under common management – Shifting of machinery on closure of work along with bag and baggage to be considered as shifting of the factory and not closure – Transfer of unutilized credit held permissible.

[ECIE Impact Pvt. Ltd. vs. CCE (2007) 8 STR 325 (Tri – Bang.)]

(g) Change in Management – Goods manufactured earlier remained the same even after a change in management – Appellants well in advance sought the permission from the authorities and after having waited for two years, they effected a transfer of the credit again informing the authorities – Procedure in seeking permission rightly followed – There being no communication from the authorities concerned either granting or refusing the permission, it shall be deemed to have been granted after a lapse of a reasonable length of time.

[Hindustan Lever Ltd. vs. CCE (2007) 8 STR 328 (Tri – Mumbai)]

(h) CENVAT / MODVAT – Transfer of Ownership / Removal of Capital Goods – Factory as a whole (with all capital goods therein) transferred by appellants – No physical removal of capital goods from the factory – Appellants, having ceased to be the owner of factory, were unable, either by themselves or through authorized agent, to issue any such invoice as envisaged under Rule 11(1) of Central Excise Rules, 2002 read with Rule 3(4) of CENVAT Credit Rules, 2002. Input duty credit or capital goods credit already availed and utilized, not recoverable from a manufacturer of final products alienating his factory by way of sale and surrendering his central excise registration to Department.

[Bilt Industrial Packaging Company Ltd. vs. CCE (2007) 216 ELT 217 (Tri – Chennai)]

(i) Shifting of a part of factory, viz. spinning plant – Rule 8 of CENVAT Credit Rules, 2002 (Rule 10 of CENVAT Credit Rules, 2004) does not permit transfer of the credit, if only a part of

factory is shifted – assessee held as not entitled to transfer of CENVAT credit.

[CCE v. Ruby Mills Ltd. (2007) 211 ELT 271 (Tri – Mumbai)]

(j) Capital goods, sale of – Absence of physical removal of capital goods after sale, effect – CENVAT credit availed on power unit sought to be recovered by Revenue as said unit sold to another company – Plea that Modvat Credit Rules not violated as power unit not removed – HELD : Transaction between assessee and buyer of unit an absolute sale, purchaser running power unit from same premises as absolute owner and supply in power to assessee on payment basis – Assessee company lost its ownership and control – Transaction nothing short of physical removal of CENVATed unit – Tribunal's order passed in favour of assessee, without application of mind and without proper appreciation of transaction, set aside.

[CCE vs Associated Cement Co. Ltd. (2009) 236 ELT 240 (KAR)]

(k) CENVAT Credit Rules do not require transfer of credit corresponding only to the quantum of inputs transferred to new factory.

[CCE v CESTAT (2008) 230 ELT 209 (MAD) – SLP dismissed by SC – (237 ELT A 48)]

CHAPTER XV

Recovery and Penal Provisions

15.1 Wrongful / irregular availment of credit

If CENVAT credit has been taken or utilized wrongly, the same becomes payable along with interest. Provisions of Sections 11A and 11AB of Central Excise Act, 1944 (in respect of excisable goods) and Sections 73 and 75 of the Act (in respect of services) shall apply mutatis mutandis for effecting the recovery – Rule 14 of CENVAT Credit Rules, 2004.

Section 11A of Central Excise Act, 1944 and Section 73 of the Act provide for the recovery of excise duty and service tax respectively.

15.2 Interest on wrongly taken credit which is unutilised

(a) Sometimes CENVAT credit is wrongly taken by the asessee in their records but the same is not utilized for discharging duty liability. Only an entry of credit remains in the books of account. Rule 14 of CENVAT Credit Rules, 2004 provides that :

"Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or provider of the output service and the provisions of he sections 11A and 11AB of the Excise Act, or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."

In CCE vs. Maruti Udyog Ltd. (2007) 214 ELT 173 (P & H)], the Hon'ble Punjab & Haryana Court agreed with the views of the Hon'ble CESTAT that assessee was not liable to pay interest as the credit was only taken as entry in the MODVAT record and was in fact not utilized. It was held that in the absence of utilization of credit, assessee was not liable to pay interest. SLP filed by the revenue against this order of the Hon'ble P & H High Court has been dismissed by Hon'ble Supreme Court (2007) 214 ELT A 50 (SC) on 10.10.2006.

After nearly three years of the Supreme Court dismissing the SLP, the Department has come out with the circular on

3.9.2009 [Circular No. 897 / 17 / 2009 – CX., dated September 3, 2009]. The circular clarifies as under :

"the Tribunal decision and the High Court judgment referred to above, was delivered in the context of erstwhile Rule 57 I of the Central Excise Rules, 1944 and that the Supreme Court order under reference is only a decision and not a judgment. Since, Rule 14 of the CENVAT Credit Rules, 2004, is clear and unambiguous in the position that interest would be recoverable when CENVAT credit is taken or utilized wrongly, it is clarified that the interest shall be recoverable when credit has been wrongly taken, even, if it has not been utilized, in terms of wordings of the present Rule 14."

It may be noted that erstwhile Rule 57 I of the Central Excise Rules, 1944 did not specifically provide for any interest payment along with reversal of wrongly taken credit while present Rule 14 provides for payment of interest along with reversal of wrongly taken credit.

(b) Attention is drawn to the ruling in Ind – [Swift Laboratioes Ltd. v. UOI (2009) 240 ELT 328 (P & H)]. [Relevant extracts from which, are reproduced hereafter for reference :

"The scheme of the Act and the CENVAT Credit Rules framed thereunder permit a manufacturer or producer of final products or a provider of taxable service to take CENVAT credit in respect of duty of excise and such other duties as specified. The conditions for allowing CENVAT credit are contained in Rule 4 of the Credit Rules contemplating that CENVAT credit can be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service. Such CENVAT credit can be utilized in terms of Rule 3(4) of CENVAT Credit Rules for payment of any duty of excise on any final product and as contemplated in the aforesaid sub-rule. It, thus, transpires that CENVAT credit is the benefit of duties leviable or paid as specified in Rule 3(1) used in the manufacture of intermediate products etc. In other words, it is a credit of the duties already leviable or paid. Such credit in respect of duties already paid can be adjusted for payment of duties payable under the Act and the Rules framed thereunder. Under Section 11AB of the Act, liability to pay interest arises in respect of any duty of excise has not been levied or paid or has

been short levied or short paid or erroneously refunded from the first day of the month in which the duty ought to have been paid. Interest is leviable if duty of excise has not been levied or paid. Interest can be claimed or levied for the reason that there is delay in the payment of duties. The interest is compensatory in nature as the penalty is chargeable separately.

In Pratibha Procesors v Union of India, 1996 (88) ELT 12 (SC) = (1996) 11 SCC 101, it was held that interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. It is compensatory and different from penalty which is penal in character. Similarly, in Commissioner of Customs v. Jayathi Krishna & Co. – 2000 (119) ELT 4(SC) (2000) 9 SCC 402, it was held that interest on warehoused goods is merely an accessory to the principal and if principal is not payable, so is it for interest on it. In view of the aforesaid principle, we are of the opinion that no liability of payment of any excise duty arises when the petitioner availed CENVAT credit. The liability to pay duty arises only at the time of utilization. Even if CENVAT credit has ben wrongly taken, that does not lead to levy of interest as liability of payment of excise duty does not arise with such availment of CENVAT credit by an assessee. Therefore, interest is not payable on the amount of CENVAT credit availed of and not utilized.

Reliance of respondents on Rule 14 of the Credit Rules that interest under Section 11AB of the Act is payable even if CENVAT credit has been taken. In our view, said clause has to be read down to mean that where CENVAT credit taken and utilized wrongly. Interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. On conjoined reading of Section 11AB of the Act and that of Rules 3 and 4 of the Credit Rules, we hold that interest cannot be claimed from the date of wrong availment of CENVAT credit. The interest shall be payable from the date CENVAT credit is wrongly utilized".

(c) In view of the foregoing, it would appear that though correctness of CBEC Circular stated in para (a) above needs to be judicially tested, issue would be litigative.

15.3 Issue of show cause notice (SCN) for recovery of CENVAT credit wrongly taken / utilized

(a) Time Limits

(i) **Within one year** - Where excise duty/service tax has not been levied or paid or has been short levied or short paid or erroneously refunded, within one year from the relevant date, the Assistant Commissioner/Deputy Commissioner of Central Excise is required to serve a notice on the person chargeable to the excise duty/ service tax, which has not been paid or levied or short paid, requiring him to show cause as to why he should not be liable to pay the amount specified in the notice.

(ii) **Within five years** - If any excise duty/service tax has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud, collusion, willful misstatement, suppression of facts or contravention of any of the provisions of the Act or the Rules made thereunder with intent to evade the payment of excise duty/service tax.

The above would apply for the recovery of CENVAT credit wrongly taken / utilized.

(b) Invocation of Extended Period

The extended period of 5 years, can be invoked in terms of proviso to Section 11A of Central Excise Act, 1944 / Section 73 of the Finance Act 1994, if excise duty / service tax has not been levied or has been short levied or short paid by reason of:

- fraud or
- collusion or
- any wilful misstatement or
- suppression of facts or
- contravention of any of the provisions of the Act or Rules

with an intent to evade the payment of tax / duty. Hence, the existence of any of the above circumstance is absolutely essential and a prerequisite for invocation of extended period in terms of proviso to Section 11A of Central Excise Act, 1944 / Section 73 of Finance Act.

Further, it is a very clearly laid down principle that, in cases where the excise department / service tax authorities wishes to invoke the extended time limit of 5 years for issuing show cause notice (SCN), it can be done only if an assessee is guilty of willful misstatement or collusion or suppression of facts or contravention of any of the provisions of Central Excise / Service Tax Rules with an intent to evade the payment of duty. The elements of willfulness, collusion and suppression of facts with an intent to evade the payment of duty all belong to the domain of criminal jurisprudence having an element of *mens rea* i.e. existence of guilty mind. Therefore, the onus is on the central excise / service tax department to prove that one or other of these elements is present, so as to justify the issue of SCN by availing the extended time-limit.

In this regard recourse could be made to extensive precedents of Supreme Court Rulings under central excise [for example – Tamil Nadu Housing Board vs. CCE 74 ELT 9(SC); Pushpam Pharmaceuticals Company vs. CCE 78 ELT 401 (SC), Cosmic Dye Chemical vs. CCE 75 ELT 721 (SC)].

It has also been a settled position under central excise that, where duty has not been paid by an assessee due to a *bona fide* belief that no duty was required to be paid, extended period of 5 years cannot be invoked. (The said principle is applicable for service tax as well).

In this regard reliance can be placed on Supreme Court Rulings viz. Padmini Products vs. CCE (1989) 43 ELT 195 (SC) and CCE vs. Surat Textile Mills Ltd. (2004) 167 ELT 379 (SC – 3 Member Bench).

15.4 Penalty for wrong availment of credit

(a) Penalty is leviable under Rule 15(1) of CENVAT Credit Rules, 2004 for wrongful availment or utilisation of CENVAT credit on inputs / capital goods input services as under :

(i) confiscation of goods and

(ii) monetary penalty not exceeding the duty or service tax on such goods or services or Rs.2,000, whichever is higher.

Where the credit has been taken or utilized wrongly on inputs/capital goods/input services on account of fraud, wilful misstatement, collusion or suppression of facts, or contravention of any provision of Central Excise Act or of the rules made thereunder with the intent to evade duty, penalty provisions of section 11AC of Central Excise Act, 1944 would apply.

(b) Under rule 15(3) of the CENVAT Credit Rules, 2004 where the credit has been taken or utilized wrongly on inputs/capital goods/input services on account of fraud, willful misstatement, collusion or suppression of facts, or contravention of any provision of these rules or of the Finance Act, 1994 or of the rules made thereunder with an intent to evade tax, penalty provisions of section 78 of the Finance Act, 1994 would apply.

(c) Attention is drawn to an important Supreme Court Ruling in CCE v Gujarat Narmada Fertilizer Co Ltd. (2009) 240 ELT 661 (SC) wherein the following observations were made in para 13 :

"It may be noted that litigation on interpretation of CENVAT Credit Rules has arisen on account of conflicting decisions given by the various Benches of CESTAT, the reason being that the Rules have not been properly drafted. In the circumstances, we are of the view that no penalty is leviable……."

(d) With effect from 1.3.2008, Rule 15A has been introduced under CENVAT Credit Rules, 2004, to provide that any person who contravenes provisions of CENVAT Credit Rules, 2004 for which no penalty has been provided under CENVAT Credit Rules, 2004, shall be liable to penalty which may extend upto Rs.5000.

15.5 Some judicial rulings

(a) The credit on education cess used for the payment of duties of central excise other than education cess. However, mistake happened during initial days of introduction of education cess – Demand not sustainable, confirmation of duty and permitting the taking of credit again being a Revenue neutral exercise – However, penalty imposable, infraction of law being clearly established – Rules 14 and 15 of CENVAT Credit Rules, 2004.

[Dr. Writer's Food Products Pvt. vs. CCE (2008) 11 STR 445 (Tri – Mumbai)]

(b) CENVAT availed on capital goods while claiming depreciation under Section 32 of Income Tax Act – Assessee reversed CENVAT credit availed prior to issuance of show cause notice – No intention to evade the payment of duty – Penalty rightly reduced by Commissioner (Appeals).

[CCE vs. Chetna Cement Pvt. Ltd. (2007) 5 STR 25 (Tri Mumbai)]

(c) Credit taken on inputs which were not utilized for production for about two years – Credit not wrongly taken inasmuch as, the inputs were required for proposed future manufacture – Rule 15 of CENVAT Credit Rules, 2004.

[CCE vs. Ind – Swift Ltd. (2007) 5 STR 14 (Tri – Del)]

(d) Any input service used by the manufacturer whether directly or indirectly in or in relation to the manufacture and clearance from place of removal covered by definition and eligible for credit – Showroom is the place of removal as final product cleared to own showroom and no sale at factory gate – Services used till place of removal eligible for credit – CENVAT credit of service tax paid on impugned services eligible as credit – Credit not admissible on services directly or wholly attributable to trading activities – Issue involving interpretation and penalty not imposable – Interest payable on the credit held as not admissible – Sections 11A, 11AB and 11AC of Central Excise Act, 1944 – Rules 2(1), 14 and 15 of CENVAT Credit Rules, 2004.

[Metro Shoes Pvt. Ltd. vs. CCE (2008) 10 STR 382 (Tri – Mumbai)]

(e) Goods transport agency service used by the assessee for transportation of their final products from the factory to customers premises cannot be considered to have been used, directly or indirectly, in relation to the clearance of goods from the factory viz., place of removal – Rules 2(1) and 3 of CENVAT Credit Rules, 2004.

However, dispute between party and department, by and large, in the nature of divergent construction of provisions of law – Penalty set aside – Rule 15 of CENVAT Credit Rules, 2004.

[India Japan Lighting Pvt. Ltd. vs. CCE (2007) 8 STR 124 (Tri – Chennai)]

(f) Irregularity in assessment proceedings by an officer, who was not bereft of the authority to assess the appellant - Assessment orders could not be held to be null and void on account of irregularities committed by the assessing officer during the course of assessment proceedings - At best, it was an illegality, which was capable of and has been cured by High Court by setting aside the orders and by granting consequential relief.

Distinction between null and void orders and orders which are irregular, wrong or illegal - All irregular or erroneous or even illegal orders cannot be held to be null and void - Where an authority making order lacks inherent jurisdiction, such order would be without jurisdiction, null, non-est and void *ab initio* as defect of jurisdiction of an authority goes to root of matter and strikes at its very authority to pass any order and such a defect cannot be cured even by consent of the parties.

[Deepak Agro Foods vs. State of Rajasthan (2008) 228 ELT 510 (SC)]

(g) Credit reversed on being pointed of irregularity - Evidence or allegation absent in a show cause notice that the credit availed with intent to evade duty - High Court in CCE vs. Steel Strips Ltd. 2008 (221) E.L.T. 193 (P&H) in the similar case held that penalty not imposable if irregular credit not utilized and the intent to evade absent - Impugned order upholding adjudication order on non-imposition of penalty, sustainable - Rule 15 of CENVAT Credit Rules, 2004.

[Jay Bee Woollen Mills vs. CCE Ludhiana (2008 (226) ELT 595 (Tri-Del)]

CHAPTER XVI

Accounting for CENVAT Credit

16.1 Introduction

Service tax is payable on receipt basis whether the amount is received prior to (i.e. in advance) or post provision of the service and / or raising of invoice. On the same basis, CENVAT credit in respect of service tax paid can be availed only after payment for the same is made to the service provider and, to the Government in cases where tax is payable under reverse charge mechanism.

So far as central excise duty is concerned, liability to pay arises on the date and at the time of removal of the goods from the place of removal which could be the factory of the manufacturer, a depot or a warehouse, as the case may be. On the same lines, input tax credit in respect of excise duty paid to the supplier of the excisable goods can be availed immediately on receipt of the goods in the factory/premises of the service provider. CENVAT credit in respect of capital goods is required to be availed in two instalments: 50% in the year of receipt of capital goods in factory of the manufacturer/premises of the service provider and balance 50% in the subsequent year.

A taxpayer may have adopted cash basis or accrual basis of accounting. In either case, one needs to exercise care and caution while determining the availment and utilization of CENVAT credit; whether it relates to service tax paid on input service or excise duty paid on inputs and capital goods.

Following are indicative accounting entries on the assumption that service provider is providing only taxable service. It is based on a simplistic situation so as to facilitate easy understanding of the accounting entries. Similar entries would be required in case of a manufacturer of excisable goods and a tax payer who is both, manufacturer of excisable goods and provider of taxable service. Description would need appropriate modifications.

In case the service provider and/or manufacturer is providing both exempt and taxable services and/or is manufacturing exempt and dutiable goods, availment would need to be determined based on the

prevailing law and the option exercised by the tax payer. The relevant provisions have already been discussed in the preceding Chapters.

Detailed guidance in relation to accounting is available in the Guidance Note on MODVAT/CENVAT Credit issued by the Research Committee of ICAI and although, it is under revision (for updating it for the changed provision of law), it provides guidance in relation to accounting for CENVAT credit.

Illustration :

1. Assumptions

A service provider has provided services for Rs. 30,00,000/- on which service tax is payable @ 10.3% i.e., service tax of Rs 3,00,000/- , education cess (EC) of Rs: 6,000/- and secondary higher education cess (SHEC) of Rs.3,000/-.

He has received input services of Rs. 10,00,000/- and the service tax, education cess and higher secondary education cess thereon is Rs. 1,00,000/-, Rs. 2,000/- and Rs. 1,000/- respectively.

He has purchased capital goods for Rs. 1,00,000/- and inputs for Rs. 1,00,000/- and paid excise duty on the same @ 16.48%.

2. On receipt of invoice for input services

1.	Expense A/c	Dr.	10,00,000.00	
	Service tax Recoverable A/c	Dr.	1,00,000.00	
	Edu. Cess Recoverable A/c	Dr.	2,000.00	
	SHEC Recoverable A/c	Dr.	1,000.00	
	To Party A/c (being the value of input services)			11,03,000.00

3. At the time of making payment for input services received

2.	Party A/c	Dr.	11,03,000.00	
	CENVAT on input services A/c	Dr.	1,00,000.00	
	Edu. Cess on input services A/c	Dr.	2,000.00	
	SHEC on input services A/c	Dr.	1,000.00	

	To Bank A/c			11,03,000.00
	To Service Tax Recoverable A/c			1,00,000.00
	To Edu. Cess Recoverable A/c			2,000.00
	To SHEC Recoverable A/c (being payment made for input services)			1,000.00

4. At the time of purchase of asset

3.	Assets A/c	Dr.	1,00,000.00	
	CENVAT on capital goods (Recoverable) A/c	Dr.	16,000.00	
	Edu. Cess on capital goods (Recoverable) A/c	Dr.	320.00	
	SHEC on capital goods (Recoverable) A/c	Dr.	160.00	
	To S. Creditors/ Cash/ Bank A/c (being purchase of capital goods)			1,16,480.00

5. To claim 50% of credit of excise duty on capital good in the year of purchase

4.	CENVAT on capital goods A/c	Dr.	8,000.00	
	Edu. Cess on capital goods A/c	Dr.	160.00	
	SHEC on capital goods A/c	Dr.	80.00	
	Deferred CENVAT Credit on Capital Goods A/c	Dr.	8,240.00	
	To CENVAT on capital goods (Recoverable) A/c			16,000.00
	To Edu. Cess on capital goods (Recoverable) A/c (being 50% of excise duty on capital goods claimed in the year of purchase)			320.00
	To SHEC on capital goods (Recoverable) A/c (being 50% of excise duty on capital goods claimed in the year of purchase)			160.00

6. At the time of purchase of inputs

5.	Purchase A/c	Dr.	1,00,000.00	
	CENVAT on Inputs A/c	Dr.	16,000.00	
	Edu. Cess on Inputs A/c	Dr.	320.00	
	SHEC on Inputs A/c	Dr.	160.00	
	To S. Creditors /Cash/Bank A/c (being purchase of inputs)			1,16,480.00

7. Adjustment of CENVAT with Service Tax payable

6(i)	Service Tax Payable A/c	Dr.	1,00,000.00	
	Edu. Cess Payable A/c	Dr.	2,000.00	
	SHEC Payable A/c	Dr.	1,000.00	
	To CENVAT on Input Services A/c			1,00,000.00
	To Edu. Cess on Input Services A/c			2,000.00
	SHEC on Input Services A/c (being credit of service tax and cess thereon adjusted with liability)	Dr.		1,000.00
6(ii)	Service Tax Payable A/c	Dr.	8,000.00	
	Edu. Cess Payable A/c	Dr.	160.00	
	SHEC Payable A/c	Dr.	80.00	
	To CENVAT on capital goods A/c			8,000.00
	To Edu. Cess on capital goods A/c			160.00
	To SHEC on capital goods A/c (being credit of excise duty and cess thereon adjusted with liability)			80.00

6(iii)	Service Tax Payable A/c	Dr.	16,000.00	
	Edu. Cess Payable A/c	Dr.	320.00	
	SHEC Payable A/c	Dr.	160.00	
	To CENVAT Credit on Inputs A/c			16,000.00
	To Edu. Cess on Inputs A/c			320.00
	To SHEC on Inputs A/c (being credit of excise duty and cess thereon adjusted with liability)			160.00

8. At the time of providing services

7.	Sundry Debtors A/c	Dr.	33,09,000.00	
	To Income A/c			30,00,000.00
	To Service tax Liability A/c			3,00,000.00
	To Edu. Cess Liability A/c (being service tax payable on providing taxable services)			6,000.00
	To SHEC Liability A/c (being service tax payable on providing taxable services)			3,000.00

9. At the time of receipt of payment from debtor

8.	Bank A/c	Dr.	33,09,000.00	
	Service Tax Liability A/c	Dr.	3,00,000.00	
	Edu. Cess Liability A/c	Dr.	6,000.00	
	SHEC Liability A/c	Dr.	3,000.00	
	To Sundry Debtors A/c			33,09,000.00
	To Service tax Payable A/c			3,00,000.00
	To Edu. Cess Payable A/c (being amount received against services provided)			6,000.00
	To SHEC Payable A/c (being amount received against services provided)			3,000.00

10. At the time of payment of Service tax

9.	Service Tax Payable A/c	Dr.	1,76,000.00	
	Edu. Cess Payable A/c	Dr.	3,520.00	
	SHEC Payable A/c	Dr.	1,760.00	
	To Bank/ Cash A/c (being Service tax paid)			1,81,280.00

11. In the immediately succeeding year (Next Year)-

To claim balance 50% of credit of excise duty on capital goods in the subsequent year

01/04/….	CENVAT on capital goods A/c	Dr.	8,000.00	
	Edu. Cess on capital goods A/c	Dr.	160.00	
	SHEC on capital goods A/c	Dr.	80.00	
	To Deferred CENVAT Credit on capital goods A/c (being credit availed in respect of the balance of 50% excise duty paid on capital goods in the immediately preceding year)			8,240.00

An assessee is not eligible to claim twin benefits on the excise duty paid on capital goods as also depreciation. The assessee can either claim benefit (in the form of depreciation) under Income Tax Act by capitalizing the amount of excise duty or it can claim 100% credit of excise duty (50% in the first financial year and 50% in the succeeding year) under CENVAT credit provisions.

CHAPTER XVII

CENVAT Credit Audit

17.1 Introduction

Liberalized self assessment procedures under central excise and service tax have, on the one hand, increased the responsibility of the assessee by shifting the onus to the assessee to determine correct excise duty / service tax liability and, on the other hand, created need for exercising greater vigilance on the part of the tax authorities. Audit is thus an important tool for both assessees and tax authorities.

Audit for CENVAT credit, unlike tax audit under Income- tax Act, 1961, is not prescribed compulsorily for assesses under central excise or service tax law at present. However, considering complexities of law and changing procedures, it has been found to be a very important part of internal / management audit. Tax department too conducts audits on regular basis.

17.2 Departmental audit

The central excise / service tax department has its internal audit wing which conducts selective audit of the manufacturing concerns / service providers. The selection, as well as frequency of the audit usually depends upon revenue potential and suspect status of the unit. An audit party, usually consisting of one Superintendent and two or three Inspectors, spends two to seven days at concerned locations for audit depending upon the volume of work involved.

The selective audit of service tax payers and other assesses like input service distributors, may be done by the jurisdictional central excise officer (authorized for the purpose) or by an audit party deputed by the Comptroller and Auditor General of India. It is mandatory for every assessee to make available, on demand, the records for inspection and examination to such authorized person / audit party.

CBEC Circular /instructions regarding central excise / service tax audit issued earlier are enclosed as **Annexure 17.1** for reference.

The Revenue Department, in the year 2000 introduced a system of central excise/service tax audit using professional, financial, accounting and audit principles to replace the then existing system

which was more of a mechanical checking of prescribed records. Excise Audit Manual and Audit Programme has been replaced with the assistance from the Department of Revenue, Canada. The officers have been trained in using the course materials so prepared. Professional technique of "Risk Management" i.e. assessment of the risk to revenue in the selection of companies for this purpose has been developed. This system of audit is based, in case of companies, on company's records required to be maintained under the Companies Act, 1956.

One of the significant aspects of this system is to make the selection of assessees on a more scientific basis rather than based on the normal rules of turnover. Various parameters such as excise payment, evasion of duty, goods manufactured, profit profile, industry input-output norms, trend analysis and internal control systems are used to decide whether a company is to be subjected to an in-depth audit or not.

17.3 Statutory CENVAT audit

Section 14AA of Central Excise Act provides that if the Commissioner of Central Excise has reasons to believe that manufacturer of final products has availed or utilized credit of the duty under CENVAT Credit Rules which is not within the normal limit having regard to nature of excisable goods produced or manufactured, the type of inputs used and other relevant factors as he may deem appropriate or has availed the duty by reason of fraud, collusion or willful mis-statement or suppression of facts, he may direct such a manufacturer of final products to get the accounts of his establishment audited by a Cost Accountant nominated by him. The Cost Accountant so nominated is required to submit the report for such audit, duly signed and certified by him, to the Commissioner of Central Excise.

With effect from 19.08.2009, the Finance (No. 2) Act, 2009 has amended section 14AA to provide that a Chartered Accountant may also be nominated for such audit.

17.4 Internal audit by manufacturer of final products / service provider

In view of the introduction of reforms in central excise procedures / simplified service tax procedures and consequent shifting of the responsibility from central excise/service tax department to the assessee for the determination of correct excise duty / service tax

liability, the conduct of regular audits by assessee itself has gained increased significance. This could also involve audits by professionals who report directly to the management. While the general coverage could focus on revenue as well as areas for savings in tax costs, specific areas which require the focus from the management's perspectives are also covered.

Significance of CENVAT credit audit

The significance of CENVAT credit audit arises on account of the following factors, in particular :

(a) Since CENVAT is now extended to almost all the excisable products, and over 100 taxable services, financial implication in the context of any manufacturer of final products / service provider would be significant. The CENVAT Credit Rules, under which CENVAT credit is permitted across goods and services, have added a new dimension to the increased significance of CENVAT audit.

(b) CENVAT credit scheme is essentially a beneficial scheme and hence, it becomes important for any manufacturer of final products / service provider to ensure that the maximum benefits to which he is entitled to are properly availed.

(c) CENVAT Credit Rules prescribe elaborate compliances for availment, utilization etc. under the scheme. For misuse of CENVAT credit facility, a mandatory penalty equivalent to amount of credit wrongly availed can be levied under the CENVAT Credit Rules. Hence, proper statutory compliance of CENVAT Rules by a manufacturer of final products / service provider is very essential.

(d) CENVAT credit scheme involves co-ordination among different departments of a manufacturer of final products / service provider viz. purchases, stores, commercial, excise, service tax, finance and accounts etc.

(e) According to Rule 4(4) of the CENVAT Credit Rules, credit of specified duty paid on capital goods is not allowable, if manufacturer of final products / service provider claims depreciation u/s 32 of Income Tax Act, 1961 on the amount of specified duty paid on such capital goods. [Hence, in the case of capital goods, before availing credit under CENVAT credit scheme, an evaluation may have to be carried out with the help of an audit to ascertain what would be beneficial: availment of CENVAT or depreciation under Income Tax].

(f) In the context of new projects, several issues could arise as to the liability to central excise duty / service tax and entitlement to CENVAT credit benefit and the financial implications could be significant. [In such cases an auditor would have to identify issues, analyse each issue in detail and give feed back thereon to the manufacturer of final products / service provider to enable him ensure that the maximum benefit to which he is entitled is properly availed and litigations are minimized].

17.5 Types of CENVAT credit audit

Some of the types of audits that can be conducted by a manufacturer of final products / service provider in relation to CENVAT credit scheme are as under:

(a) Internal Audit

This could be continuous, one time or specific area /activity related.

(b) New Projects Audit

This would cover all aspects relating to a specific project with a focus on capital goods.

(c) Documentation Audit

This could be conducted with a special focus on all aspects relating to specified documents for the availment of CENVAT credit. The efficiency of the MIS can also be judged here.

(d) Physical Verification Audit

This could be conducted to ascertain / cross check balances as per statutory stock records vis-a-vis physical stocks and other related items.

(e) Audit of Registered Dealers

This would cover the documents and records maintained and returns filed by dealers.

(f) Audit of Input Service Distributor

This would cover the documents and records maintained by an input service distributor for receipt and distribution of CENVAT credit.

(g) Refunds Audit

This can be conducted in cases where manufacturer of final products / service provider have significant exports. Audit could cover ascertainment of refund entitlement as to duties / taxes paid in regard to exports, evaluation of options available and its selection, etc.

17.6 Internal audit methodology

Any internal CENVAT credit audit would generally involve the following broad steps :

(a) Ascertainment of information as to internal control systems and review thereof

(b) Identification of documents / records to be verified

(c) Preparation of audit programme

(d) Preparation of audit plan

(e) Conduct of audit

(f) Submission of audit report

(g) Discussions of audit findings with the management

ANNEXURE 17.1

CBEC CIRCULAR F No. 381/145/2005 Dt. 6.6.06

REVISION OF THRESHOLDS FOR FREQUENCY OF AUDIT IN RESPECT OF CENTRAL EXCISE AND SERVICE TAX AUDITS

1. I am directed to say that the frequency for audit of central excise and service tax assessees, currently prescribed in the respective Audit Manuals, is as under:

FOR CENTRAL EXCISE		
S. No.	**Quantum of annual duty payment in cash**	**Frequency of audit**
1.	Units paying more than Rs. 1 crore	Every year
2.	Units paying between Rs. 10 lakhs and Rs. 1 crore	Once in two years
3	Units paying below Rs. 10 lakhs	Once in five years
Besides, all Export Oriented Units (EOU's) are required to be audited mandatorily every year. For the categories at s. nos. 2 and 3 above, the selection of units is to be based on a combination of unitwise rupee risk calculations circulated by DG (Audit) and local risk parameters.		
FOR SERVICE TAX		
S. No.	**Quantum of annual duty payment (in cash + CENVAT credit)**	**Frequency of audit**
1.	Taxpayers paying more than Rs. 10 lakhs	Every year
2.	Taxpayers paying below Rs. 10 lakhs	Not prescribed
The selection of taxpayers at S.No. 2 above is to be done on the basis of risk parameter S1 and local risk parameters listed in the Service tax Audit Manual. However, in the absence of adequate data for their computation, it has been prescribed in the manual that the top 2 assessees from the top 20 duty paying services in each Commissionerate should be selected for audit each year, as an interim measure.		

1. Owing to the fact that payment of duty through CENVAT credit is quite substantial in many industries, a more representative selection can be achieved in central excise using the total duty payment (i.e. cash and

CENVAT credit taken together) as the basis for selection. A view was also expressed that the existing norms yield a workload that is not in sync with the availability of audit staff. As a result, the stress of audit effort has shifted to quantity (i.e. number of audits) rather than quality.

2. In the light of all these factors and in order to achieve more focused targeting of units, Board has decided to revise frequency norms with immediate effect. The revised frequencies are as under:

CENTRAL EXCISE		
S. No.	**Quantum of annual duty payment (in cash + CENVAT credit)**	**Frequency of audit**
1	Units paying more than Rs. 3 crores	Every Year
2.	Units paying between Rs. 1 crore and Rs. 3 crores	Once every two years
3	Units paying between Rs. 50 lakhs and Rs. 1 crore	Once every five years
4	Units paying below Rs. 50 lakhs	10% of the units every years

For the categories mentioned at s nos. 2 to 4 of the table above, the selection of units would continue to be based on the unit-wise rupee risk calculations circulated by DG (Audit) combined with local risk parameters, if any.

3. In respect of EOUs the Board has decided that about 500 EOUs should be audited mandatorily all over the country. It has also been decided that the selection of these units should be made as per the criteria circulated by DG (Audit). Based on the data available with this Directorate it is observed that this target would be achieved if each Commissionerate audits about 25% of the EOUs engaged in the manufacture of excisable goods that are registered and functioning. Within this category, the selection may be made on the basis of the 'total value of inputs and capital goods received by the EOU without payment of duty' during the last financial year. This figure is available in column of s. no. 5 of the ER 2 return filed by the unit and would have to be aggregated for the full year for each unit. All such EOUs in the Commissionerate should be arranged in descending order of this total value and the top 25% should be selected for audit from the list. Thus, EOU's with a higher value of inputs / capital goods received in a year should be given priority over an EOUs having a lower value.

EOUs manufacturing non-excisable goods (such as primary produce or software) need not be audited mandatorily. However, the order of selection obtained by this method may be circumvented in case it is felt that there are overarching local risk factors (such as past compliance history, recent closure etc.) that apply in individual cases. In the latter situation, a unit may be audited on priority even though it does not figure in the top 25% by the total value of duty – free inputs and capital goods. The remaining EOUs may be taken up for audit depending on the availability of staff.

4. The revised norms for service tax would be as under:

SERVICE TAX		
S. No.	**Quantum of annual total duty payment in (in cash + CENVAT credit)**	**Frequency of audit**
1.	Taxpayers paying more than Rs. 50 lakhs	Every year
2.	Taxpayers paying between Rs. 25 lakhs and Rs. 50 lakhs	Once in two years
3.	Taxpayers paying between Rs. 10 lakhs and Rs. 25 lakhs	Once in five years
4.	Taxpayers paying below Rs. 10 lakhs	2% of the total number every year

For the categories mentioned at s. nos. 2 to 4 the selection of assessee would be based on S1 parameter and local risk parameters mentioned in the Service Tax Audit Manual.

5. The revised frequency norms may be implemented with immediate effect. However, units those have already been audited during the first quarter of this financial year need not be audited again even if they are due as per the revised norms. Any difficulties encountered in the implementation of these norms may be brought to the notice of this Directorate.